APR 11 1986 COMPLETED 4/1.1/8:99-507

99TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
99-507

# ELECTRIC CONSUMERS PROTECTION ACT OF 1985

---

MARCH 25, 1986.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. DINGELL, from the Committee on Energy and Commerce, submitted the following

## REPORT

together with

## ADDITIONAL VIEWS

[To accompany H.R. 44]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce to whom was referred the bill (H.R. 44) to amend the Federal Power Act to provide for more protection to electric consumers, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS


| | |
|---|---|
| The Amendment | 2 |
| Purpose and Summary | 10 |
| Background and Need for Legislation | 11 |
| Preference | 12 |
| Merwin Dam Case | 16 |
| Fish and Wildlife and Other Non-Power Values | 17 |
| Energy Conservation | 23 |
| Compensation | 23 |
| New License Access | 24 |
| Hearings and Studies | 24 |
| Committee Consideration | 25 |
| Committee Oversight Findings | 26 |
| Committee on Government Operations | 27 |
| Committee Cost Estimate | 28 |
| Congressional Budget Office Estimate | 28 |
| Inflationary Impact Statement | 29 |
| Section-by-Section Analysis and Discussion | 29 |
| Changes in Existing Law Made by the Bill, as Reported | 48 |
| Additional Views | 60 |


70-006 O

COD

BEST COPY AVAILABLE

## THE AMENDMENT

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Electric Consumers Protection Act of 1985".

SEC. 2. AMENDMENTS TO SECTION 7.

Section 7(a) of the Federal Power Act (16 U.S.C. 800(a)) is amended as follows—

(1) Insert "original" after "hereunder or".

(2) Strike out "and in issuing licenses to new licensees under section 15 hereof" and substitute a comma.

SEC. 3. ENVIRONMENTAL CONSIDERATION IN LICENSING.

(a) PURPOSES OF LICENSE.—Section 4(e) of the Federal Power Act is amended by adding the following at the end thereof: "In issuing any license under this Part for any project, the Commission shall give equitable treatment with the development purposes for which the license is issued to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.".

(b) CONFORMING AMENDMENT.—Section 10(a) of such Act is amended by striking "purposes; and" and inserting after "recreational" the following: "and other purposes referred to in section 4(e)".

(c) FISH AND WILDLIFE PROTECTION, MITIGATION, AND ENHANCEMENT.—Section 10 of the Federal Power Act (16 U.S.C. 803) is amended by adding at the end the following:

"(j)(1) That in order to adequately protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which the license is issued, each license, exemption, or permit issued under this Part shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (3) and section 30, such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

"(2) The requirements of section 4(h)(11) of the Pacific Northwest Electric Power Planning and Conservation Act shall apply as provided in that Act to any license, exemption, or permit issued under this part for a project within the area subject to that Act.

"(3) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this Part or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

"(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this Part or with other provisions of law applicable to the project.

"(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) shall not apply to the conditions required under this subsection.".

SEC. 4. RELICENSING PROCEDURES.

(a) CONFORMING AMENDMENT.—Section 15(a) of the Federal Power Act is amended by striking out "original" in each place it appears and substituting "existing".

(b) RELICENSING PROCESS.—Section 15 of the Federal Power Act is amended by inserting "(1)" after "(a)" and by adding the following at the end of subsection (a):

"(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest. In making this determination under this section (whether or not more than one application is submitted for the project), the Commission shall consider and make findings respecting each of the following:

BEST COPY AVAILABLE

"(A) The abilities of each applicant to comply with (i) the articles, terms, and conditions of any license issued to it as a result of the application and (ii) other applicable provisions of this Part.

"(B) The plans of each applicant to manage, operate, and maintain the project safely and in accordance with this Act and the terms and conditions of the license.

"(C) The need of each applicant for the electric power generated by the project or projects. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.

"(D) The plans of each applicant for the improvement and broad, efficient, and reliable utilization of the power potential of the waterway or waterways to which the project is related, together with other beneficial uses, including navigation, flood control, irrigation, recreation, water quality, and fish and wildlife.

"(E) The existing and planned transmission services of each applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.

"(F) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

"(G) The plans of each applicant to protect, mitigate damage to, and enhance fish and wildlife resources (including related spawning grounds and habitat) and to protect and enhance recreational and other environmental values (including providing recreational access).

"(H) The identity of any Federal or Indian lands included in the project boundary and a statement of the annual fees paid for such lands.

"(I) Plans of each applicant to adapt the project to any applicable State or Federal comprehensive plan (or plan issued pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980) for improving, developing, or conserving the waterway or waterways related to the project.

"(J) Such other information as the Commission may require.

"(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:

"(A) The existing licensee's record of compliance with the terms and conditions of the existing license.

"(B) The actions taken by the existing licensee related to the project which affect the public.

"(b)(1) Each existing licensee shall notify the Commission whether the licensee intends to file an application for a new license or not. Such notice shall be submitted at least 5 years before the expiration of the existing license.

"(2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably available to the public for inspection at the offices of such licensee: current maps, drawings, data, and other information that the Commission shall, by rule, require regarding the construction and operation of the licensed project. Such information shall include, to the greatest extent practicable, pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at reasonable costs of reproduction. Within 180 days after the enactment of the Electric Consumers Protection Act of 1985, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.

"(3) Promptly following receipt of notice under paragraph (1), the Commission shall provide public notice of whether an existing licensee intends to file or not to file an application for a new license. The Commission shall also promptly notify the National Marine Fisheries Service and the United States Fish and Wildlife Service, and the appropriate State fish and wildlife agencies.

"(c)(1) Each application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license. Each applicant shall consult with the fish and wildlife agencies referred to in subsection (b) and, as appropriate, conduct studies with such agencies. Within 60 days after the statutory deadline for the submission of applications, the

BEST COPY AVAILABLE

Commission shall issue a notice establishing expeditious procedures for relicensing and a deadline for submission of final amendments, if any, to the application.

"(2) The time periods specified in this subsection and in subsection (b) shall be adjusted, in a manner to achieve the objectives of this section, by the Commission by rule or order with respect to existing licensees who, by reason of the expiration dates of their licenses, are unable to comply with a specified time period.

"(d)(1) In evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has, or has access to, adequate transmission facilities.

"(2) When the Commission issues a new license (pursuant to this section) to an applicant which is not the existing licensee of the project and finds that it is not feasible for the new licensee to utilize the energy from such project without provision by the existing licensee of reasonable services, including transmission services, the Commission shall give notice to the existing licensee and the new licensee to immediately enter into negotiations for such services and the costs demonstrated by the existing licensee as being related to the provision of such services. It is the intent of the Congress that such negotiations be carried out in good faith and that a timely agreement be reached between the parties in order to facilitate the transfer of the license by the date established when the Commission issued the new license. If such parties do not notify the Commission that within the time established by the Commission in such notice (and if appropriate, in the judgment of the Commission, one 45-day extension thereof), a mutually satisfactory arrangement for such services that is consistent with the provisions of this Act has been executed, the Commission shall order the existing licensee to file (pursuant to section 205 of this Act) with the Commission a tariff, subject to refund, ensuring such services beginning on the date of transfer of the project and including just and reasonable rates and reasonable terms and conditions. After notice and opportunity for a hearing, the Commission shall issue a final order adopting or modifying such tariff for such services at just and reasonable rates in accordance with section 205 of this Act and in accordance with reasonable terms and conditions. The Commission, in issuing such order, shall ensure the access necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the license and this Part, except that in issuing such order the Commission:

"(A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the construction of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities necessary to carry out the purposes of this paragraph;

"(B) shall not adversely affect the continuity and reliability of service to the customers of the existing licensee;

"(C) shall not adversely affect the operational integrity of the transmission and electric systems of the existing licensee; and

"(D) shall not cause an increase (other than a possible de minimus increase) in the jurisdictional rates of the existing licensee.

Such order shall be for such period as the Commission deems appropriate, not to exceed the term of the license. At any time, the Commission, upon its own motion or upon a petition by the existing or new licensee and after notice and opportunity for a hearing, may modify, extend, or terminate such order.

"(e)(1) When a license is issued pursuant to this section to an applicant other than the existing licensee, the Commission may require the new licensee to provide reasonable compensation to the existing licensee in addition to the amount required to be paid pursuant to subsection (a)(1). All of such compensation may be in money or electric power, or both.

"(2) In providing any compensation under this section, the Commission shall take each of the following into consideration:

"(A) The fact that upon expiration of its license under this Part, the prior licensee has no cognizable legal right to compensation for the license.

"(B) The extent to which the costs of the project have been amortized by the existing licensee.

"(C) The costs to the new licensee of duplicating the hydroelectric facility which is the subject of the license (including all power facilities, dams, and appurtenant structures and equipment), taking into account the remaining useful life of the facility.

"(3) The Commission shall promulgate regulations to implement this subsection. The regulations shall provide guidance for the Commission and applicants to follow in determining reasonable compensation in appropriate cases. Such regulations may provide for such compensation as the Commission finds to be appropriate toward the mitigation of any demonstrated economic loss to the customers of the existing licensee. The regulations shall not establish compensation which discourages competition for a project or provides a windfall for current ratepayers or to the existing or new licensee. The regulations shall be promulgated within 180 days after enactment of the Electric Consumers Protection Act of 1985.".

(c) CONFORMING AMENDMENTS.—(1) Section 15(b) of the Federal Power Act is redesignated as subsection (f).

(2) Section 14(b) of such Act is amended by striking out the first sentence.

SEC. 5. COMMISSION AUTHORITY.

Part I of the Federal Power Act is amended by adding the following new section at the end thereof:

"SEC. 31. ENFORCEMENT.

"(a) The Commission shall monitor and investigate compliance with each license and permit issued under this part and with each exemption granted from any requirement of this Part. The Commission shall conduct such investigations as may be necessary and proper in accordance with this Act. After notice and opportunity for hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses and permits issued under this Part and with the terms and conditions of exemptions granted from any requirement of this Part.

"(b) After notice and opportunity for an evidentiary hearing, the Commission may also issue an order revoking any license or permit issued under this part or any exemption granted from any requirement of this Part, where any licensee, permittee, or exemptee is found by the Commission:

"(1) to have knowingly violated a final order issued under subsection (a) after completion of judicial review (or the opportunity for judicial review); and

"(2) to have been given reasonable time to comply fully with such order prior to commencing any revocation proceeding.

In any such proceeding, the order issued under subsection (a) shall be subject to de novo review by the Commission. No order shall be issued under this subsection until after the Commission has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation.

"(c) Any licensee, permittee, or exemptee who violates or fails or refuses to comply with any requirement, rule, regulation, term, or condition referred to in subsection (a) or any order issued under subsection (a) shall be subject to a civil penalty in an amount not to exceed $10,000 for each day that such violation or failure or refusal continues. Such penalty shall be assessed by the Commission after notice and opportunity for public hearing. The Commission may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner. No civil penalty shall be assessed where revocation is ordered.".

SEC. 6. AMENDMENTS CONCERNING CONDUITS AND CERTAIN SMALL POWER PRODUCTION FACILITIES SUBJECT TO PURPA BENEFITS.

(a) NMFS.—Section 30(c) of the Federal Power Act (16 U.S.C. 823a) is amended by inserting "National Marine Fisheries Service" after "the Fish and Wildlife Service" in both places such term appears.

(b) STATE OR LOCAL CONDUITS.—Section 30(b) of the Federal Power Act is amended by inserting after "15 megawatts" the following: "(40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for water supply for municipal purposes)".

(c) DEFINITIONS.—Section 3(17) of the Federal Power Act is amended as follows:

(A) Insert "and" at the end of clause (ii) of subparagraph (C).

(B) Add the following at the end of subparagraph (C):

"(iii) which complies with the applicable provisions of section 30(e) of this Act in the case of a hydroelectric generating facility involving the impoundment or diversion of the water of a natural watercourse by means of a new dam or diversion;".

(C) Add the following after subparagraph (D):

"(E) 'new' when used with respect to a dam or diversion refers to a dam or diversion which—

BEST COPY AVAILABLE

"(i) is used in connection with any small power production facility; and

"(ii) requires any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices);".

(d) REQUIREMENTS FOR QUALIFICATION OF NEW DAMS AND DIVERSIONS, ETC. FOR PURPA BENEFITS.—Section 30 of the Federal Power Act is amended by adding the following new subsection at the end thereof:

"(e) No small power production facility which requires the impoundment or diversion of the water of a natural watercourse by means of a new dam or diversion may be treated as a qualifying small power production facility unless each of the following requirements are met:

"(1) At the time of issuance of the license or exemption for the facility, the Commission includes in such license or exemption terms and conditions in accordance with subsection (c) to protect, mitigate damages to, and enhance fish and wildlife, including related spawning grounds and habitat and finds that the facility, after taking into consideration such terms and conditions and compliance with other environmental requirements of law applicable to such facility and the effects of such facility alone and in combination with other facilities on the same watercourse, will not have substantial adverse effects on the environment, including recreation or water quality. The Commission shall publish the basis for such finding. Such terms and conditions shall be established and enforced in accordance with the same procedures as provided in subsections (c) and (d).

"(2) The Commission determines, at the time of issuance of the license or exemption, that the facility is not located on any segment of a natural watercourse which is included (or is designated by law for potential inclusion) in a State or national wild and scenic river system or which the State has determined, in accordance with applicable State law and prior to issuance of the license or exemption, to possess unique natural, recreational, cultural, or scenic attributes.

This subsection shall not apply for purposes of section 210 of this Act (relating to interconnection authority).".

(e) FEES FOR STUDIES.—Section 30 of the Federal Power Act is amended by adding the following new subsection at the end thereof:

"(f) The Commission, in addition to the requirements of section 10(e), shall establish fees which shall be paid by an applicant for a license or exemption for a facility referred to in subsection (a) or (e) of this section. Such fees shall be adequate to reimburse the fish and wildlife agencies referred to in subsection (c) for any reasonable costs incurred in connection with any studies or other reviews carried out by such agencies for purposes of compliance with this section. The fees shall, subject to annual appropriations Acts, be transferred to such agencies by the Commission for use solely for purposes of carrying out such studies and remain available until expended.".

(f) UNAUTHORIZED CONSTRUCTION ACTIVITIES.—Section 30 of the Federal Power Act is amended by adding the following new subsection at the end thereof:

"(g) The Commission shall promulgate such rules as may be necessary to prohibit the commencement of any significant modification of any project licensed under, or exempted from, this Act unless such modification is in accordance with the terms and conditions of such license or exemption and the applicable requirements of this Part. As used in this subsection, the term 'commencement' refers to the beginning of physical on-site activity other than surveys or testing."

(g) EFFECTIVE DATES.—(1) The amendments made by subsections (d) and (e) of this section shall not apply to any project the license or exemption application for which was filed and accepted for filing by the Commission before the date of enactment of this Act, but section 10(j) of the Federal Power Act, as added by this Act, shall apply to such project unless the license or exemption was issued on or before the enactment of this Act.

(2) Section 30(e)(2) of the Federal Power Act, as added by this Act, shall not apply to any project for which the environmental consultation (in accordance with applicable regulations of the Federal Energy Regulatory Commission) was initiated on or before the enactment of this Act.

(3) The amendments made by subsection (f) of this section shall apply to all projects licensed, exempted, or permitted under the Federal Power Act without regard to when such license, exception, or permit was issued.

(h) STUDY.—(1)(A) The Commission shall conduct a study (in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969) of whether the benefits of section 210 of the Public Utility Regulatory Policies Act of 1978 and section

210 of the Federal Power Act should be applied to small power production facilities utilizing new dams or diversions (within the meaning of section 3(17) of the Federal Power Act).

(B) The study under this paragraph shall take into consideration the need for such new dams or diversions for power purposes, the environmental impacts of such new dams and diversions (both with and without the application of the amendments made by this Act to sections 4, 10, and 30 of the Federal Power Act), the environmental effects of such facilities alone and in combination with other existing or proposed dams or diversions on the same waterway, the intent of Congress to encourage and give priority to the application of section 210 of Public Utility Regulatory Policies Act of 1978 to existing dams and diversions rather than such new dams or diversions, and the impact of such section 210 on the rates paid by electric power consumers.

(C) The study under this paragraph shall be initiated within 3 months after enactment of this Act and completed as promptly as practicable.

(D) A report containing the results of the study conducted under this paragraph shall be submitted to the Committee on Energy and Commerce of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate while both Houses are in session.

(E) The report submitted under subparagraph (D) shall include a determination (and the basis thereof) by the Commission, based on the study and a public hearing and subject to review under section 313(b) of the Federal Power Act, whether any of the benefits referred to in subparagraph (A) should be available for such facilities and whether applications for preliminary permits (or licenses where no preliminary permit has been issued) for such small power production facilities utilizing new dams or diversions should be accepted by the Commission after the period specified in paragraph (2). The report shall include such other administrative and legislative recommendations as the Commission deems appropriate.

(F) If the study under this paragraph has not been completed within 18 months after its initiation, the Commission shall notify the Committees referred to in subparagraph (D) of the reasons for the delay and specify a date when it will be completed and a report submitted.

(2)(A) The Federal Energy Regulatory Commission shall not accept any application filed under the Federal Power Act after December 31, 1985 for a preliminary permit (or for a license where no preliminary permit has been issued) for a small power production facility utilizing a new dam or diversion (as defined in section 3(17) of the Federal Power Act) until not earlier than 180 consecutive legislative days (during which both Houses of Congress are in session) have elapsed after—

(i) the submittal of such report to Congress, and

(ii) the regulations of the Commission have been revised based on the determination under paragraph (1) and the requirements of sections 4, 10, and 30 of the Federal Power Act, as amended by this Act.

(B) Notwithstanding the expiration of the 180-day period referred to in subparagraph (A), if—

(i) the Commission has determined under paragraph (1)(E) that any small power production facility utilizing a new dam or diversion (as defined in section 3(17) of the Federal Power Act) should be treated as a qualifying small power production facility within the meaning of section 3(17) of such Act, and

(ii) a joint resolution of disapproval of such determination is introduced in both Houses,

such determination shall not be effective until after the adjournment sine die of the Congress in which such resolution was introduced.

(C) In the case of an application for a license for a project (where no preliminary permit has been issued) this paragraph shall not apply to such project if the required environmental consultation (in accordance with applicable regulations of the Federal Energy Regulatory Commission), was initiated before December 31, 1985.

(3)(A) In the case of any preliminary permit referred to in paragraph (1) issued on or before December 31, 1985, such permit shall be suspended temporarily for the period referred to in paragraph (2) if the required environmental consultations (in accordance with the Commission's regulations for such projects) have not been initiated before the enactment of this Act.

(B) The suspensions under subparagraph (A) shall not apply if the Commission, in its discretion, issues a notice within 180 days after such enactment exempting all or some of such permits from such suspension on the grounds that each permittee covered by such notice has proceeded diligently under the permit and has committed substantial resources toward completion of all requirements under the permit.

BEST COPY AVAILABLE

(C) The suspension under subparagraph (A) shall terminate at the expiration of the period referred to in paragraph (2).

(i) APPLICATION OF CERTAIN SUBSECTIONS.—The provisions of subsections (d), (e), (g), and (h) of this section are applicable only to small power producers and small power production facilities using new dams or diversion (all as defined in section 3(17) of the Federal Power Act) to the extent such producers and facilities obtain the benefits of section 210 of the Federal Power Act and section 210 of the Public Utility Regulatory Policies Act of 1978.

SEC. 7. EFFECTIVE DATE.

Except as otherwise provided in this Act, the amendments made by this Act shall take effect with respect to each license, permit, or exemption issued under the Federal Power Act after the enactment of this Act. The amendments made by section 5 of this Act shall apply to licenses, permits, and exemptions without regard to when issued.

SEC. 8. COMPLIANCE WITH BUDGET ACT

Any provision of this Act (or any amendment made by this Act) which, directly or indirectly, authorizes the enactment of new budget authority described in section 402(a) of the Congressional Budget Act of 1974 shall be effective only for fiscal years beginning after September 30, 1986.

SEC. 9. PROVISION OF INFORMATION TO CONGRESS.

The Federal Energy Regulatory Commission shall keep the Committees of Congress which exercise legislative jurisdiction over the Federal Power Act fully and currently informed regarding actions of the Commission with respect to the provisions of part 1 of the Federal Power Act.

SEC. 10. ELECTION AND NEGOTIATIONS CONCERNING OTHER CONTESTED PROJECTS SUBJECT TO LITIGATION

(a) APPLICATION OF SECTION.—This section applies to any relicensing proceeding initiated prior to October 1983 at the Federal Energy Regulation Commission involving the following projects: Mokelumne (No. 137), California; Phoenix (No. 1061), California; Rock Creek/Cresta (No. 1962), California; Haas-King (No. 1988), California; Poole (No. 1388), California; Olmsted (No. 596), Utah; Weber (No. 1744), Utah; Rush Creek (No. 1389), California; and Shawano (No. 710), Wisconsin. The numbers in this subsection refer to Federal Energy Regulatory Commission project identification numbers for the existing licensee. This subsection shall also apply to any subsequent relicensing proceeding for any such project involving the same parties which results from the rejection, without prejudice, of an application in any of the proceedings specified in this subsection.

(b) PROVISIONS NOT APPLICABLE IF ELECTION MADE.—If, in the case of each project named in subsection (a), the existing licensee fails to make an election under subsection (c) within 90 days after the enactment of this Act for negotiations under subsection (e), the provisions of the Federal Power Act in effect one day prior to enactment of this Act (and the amendments made by sections 3, 5, and 6(f) of this Act to the Federal Power Act) shall apply to the relicensing proceeding referred to in subsection (a).

(c) ELECTION PROCEDURES.—An existing licensee for any project named in subsection (a) may file an election with the Commission under this subsection. The election shall be filed in the manner required by the Commission. The election, subject to subsection (d), shall consist of an agreement that, in the case of the project concerned, the licensee will—

(1) enter into good faith negotiations under subsection (e) with each person (or group of persons) who filed a competing application for a new license for the project before October 7, 1983, and

(2) be subject to the provisions of this section.

Notice of the election to negotiate or the refusal thereof shall be filed with the Commission within the 90-day period.

(d) ACCEPTANCE OR REFUSAL TO ACCEPT ELECTION.—Within 45 days after receiving notice from the Commission of an election to negotiate made by the existing licensee under subsection (c) for an applicable project, each competing license applicant (or group of applicants) referred to in subsection (a) may—

(1) accept the election, withdraw the competing application, enter into good faith negotiations in accordance with this section, and agree to be subject to the provisions of this section, or

(2) refuse to accept such election.

If the election to negotiate is not accepted by the competing applicant (or group) within the 45-day period, the relicensing proceeding for such project shall be contin-

BEST COPY AVAILABLE

ued and a new license issued solely in accordance with the Federal Power Act, as amended by this Act (including the amendments made by this Act to section 7 of the Federal Power Act). Notice of an election to negotiate or refusal must be filed with the Commission within the 45-day period.

(e) NEGOTIATIONS.—If an election to negotiate is made pursuant to subsections (c) and (d) for any project, the existing licensee and the competing applicant shall commence negotiations for each of the following:

(1) Compensation to be provided by the existing licensee for the reasonable costs incurred by the competing applicant which are related to pursuing—

(A) the application in the applicable relicensing proceeding, including the costs of preparing, filing, and maintaining such application for the period ending December 31, 1985, and

(B) the litigation in the courts involving the application of section 7 of the Federal Power Act to the applicable relicensing proceeding.

(2) Compensation in an additional sum (which may be in money or electric power or both) representing a reasonable percentage of the net investment of the existing licensee in the project, as of October 22, 1985 (as determined by the Commission, prior to the initiation of such negotiations, in accordance with section 14(a) of the Federal Power Act). In making the determination of net investment, the Commission shall utilize all relevant records and data (which the existing licensee shall provide to the Commission) applicable to the project for the term of the existing license through October 22, 1985.

The parties to the negotiations shall establish the method, period, and manner of providing all such compensation.

(f) COMMISSION ORDER.—If an election is made and accepted but negotiations under subsection (e) are not commenced by the parties within the time established by the Commission (or, if appropriate, in the judgment of the Commission, one 45-day extension thereof) or if a mutually satisfactory compensation arrangement that is consistent with the provisions of the Federal Power Act has not been executed within such time, the Commission, after notice and opportunity for a hearing, shall issue an order establishing compensation in accordance with paragraphs (1) and (2) of subsection (e). In determining the amount of compensation, the Commission may accept any stipulations agreed to by the parties as a result of the negotiations. The Commission shall also take into consideration all of the following:

(1) The quality of the relicensing proposals of the existing licensee and the competing applicant.

(2) The net benefits to both parties and their customers of obtaining the new license.

(3) The extent to which the applications filed by both parties were actively pursued (subject the effect thereon of any action by the Commission or the applicable litigation) and filed with the Commission in good faith.

(4) The extent of reliance by the competing applicant on the provisions of the Federal Power Act in effect prior to enactment of this Act and the detrimental impact of such reliance on the operations and on the service area of the applicant.

(g) COMPENSATION.—The order of the Commission under this section shall establish the method, period, and manner of providing compensation under subsection (f), and such other reasonable terms and conditions concerning such compensation, consistent with the Federal Power Act, as the Commission deems appropriate. Any payment over a period of time shall include interest compounded at a rate based upon outstanding obligations of the United States of comparable maturity. The payment period shall not exceed one-third of the new license term for the project. The order shall state the basis for the Commission's determination. The provisions of section 313 of the Federal Power Act shall apply to such order and determinations. The order (or any agreement reached by the parties by negotiation) shall be a condition of any annual license or new license (depending when the order is issued or agreement reached) issued to the existing licensee for this project. Nothing in this section shall be construed to affect the treatment, by a State regulatory authority for ratemaking purposes, of any compensation paid under this section.

(h) COMMISSION PROCEEDINGS.—Upon mutual request of the parties to any negotiation under this section, the Commission may defer any determination of net investment for the applicable project until whenever it is required to issue an order under this section for such project. No new license shall be issued under the Federal Power Act for the projects referenced in this section until there is full compliance, to the extent applicable, with this section. The Commission shall ensure that negotiations and any determinations and orders required by this section shall be conducted, made, and issued expeditiously and shall ensure that the parties do not delay.

BEST COPY AVAILABLE

SEC. 11. CHARGES FOR USE OF DAMS AND STRUCTURES.

Section 10(e) of the Federal Power Act is amended as follows:

(1) Insert "(1)" after "(e)".

(2) Add the following at the end thereof:

"(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces, 1½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours. Except as provided in subsection (f), such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

"(3) The provisions of paragraph (2) shall apply with respect to—

"(A) all licenses issued after the date of the enactment of this paragraph; and

"(B) all licenses issued before such date which—

"(i) did not fix a specific charge for the use of the Government dam or structure involved; and

"(ii) did not specify that no charge would be fixed for the use of such dam or structure.

"(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.".

SEC. 12. MERWIN PROJECT GRANDFATHER.

The amendments made by this Act, except for the amendments made by sections 5 and 6(f), shall not apply to the Federal Energy Regulatory Commission proceeding involving FERC Project Number 935 (FERC Project Number 2791), relating to the Merwin Dam in Washington State.

## PURPOSE AND SUMMARY

The legislation amends the Federal Power Act primarily for the purpose of retaining the expressed statutory preference for States and municipalities in original licensing, while making it inapplicable in proceedings following expiration of an existing license, and for reforming the procedures used by the Federal Energy Regulatory Commission to issue new licenses upon the expiration of existing hydroelectric project licenses. It creates a fair and competitive process under which a new license will be awarded to the applicant whose final proposal is best adapted to serve the public interest, taking into consideration on an equitable basis both non-power and power development values.

H.R. 44 clarifies and improves the Commission's licensing process in assuring adequate environmental protections, while retaining the basic requirement that all projects, whenever licensed, be "best adapted to a comprehensive plan for developing a waterway or waterways." Specific provisions of the Federal Power Act are amended to ensure that hydroelectric development, management, and operation will only be carried out in a manner consistent with the protection, mitigation of damage to, and enhancement of, fish and wildlife (as now generally required by the Act under sections 10, 18, and 30) by making them specifically an integral part of the Commission's licensing, exemption, and permitting process. These non-development purposes will be given "equitable treatment" with the development purposes of the Act.

The legislation also provides the Commission with new authority to enforce license terms and conditions and requires the Commission to investigate violations. It also provides the Commission with authority to guarantee meaningful access by a new licensee to the power and benefits of the license.

BEST COPY AVAILABLE

The bill amends the Act to expand existing conduit exemption provisions in the case of water supply for municipal purposes and to provide greater environmental protection and controls concerning new dams and diversions receiving benefits as qualifying small power production facilities under the Public Utility Regulatory Policies Act of 1978 (PURPA), while placing a moratorium on new applications pending a study. Finally, it specifies the annual charges for projects licensed by the Commission for the use of Federal dams and other structures.

## Background and Need for the Legislation

The Committee has crafted H.R. 44 to resolve the ongoing controversy surrounding the relicensing by hydroelectric projects—resources that have benefited consumers nationwide.

The Committee's consideration of H.R. 44 has been guided by several general principles that underlay the Federal Power Act: first, that licenses be issued for a fixed term; second, that hydro development implicates a broad range of power and non-power concerns that must be considered in the licensing or exemption from licensing of these projects; and third, that consumers have a significant interest in the projects and their licensing. These principles are reflected throughout the history of hydro development. The Committee has attempted to adhere to these principles, while preserving the power objectives of the Act.

The concern for determinate licensing has been evident since the first hydropower project was approved. For years before the Federal Power Act was enacted, hydro projects were authorized by Congress on a case-by-case basis. Bills, originating in the former Interstate and Foreign Commerce Committee, which is the predecessor of this Committee, authorized such projects across natural waterways. Indeed, on April 13, 1908, President Theodore Roosevelt vetoed one such bill because that legislation would have granted a perpetual license to use this public treasure with no chance to recapture the resource or to reexamine and change the conditions permitting the hydro facility initially. In so doing, President Roosevelt said:

> The public must retain the control of the great waterways. It is essential that any permit to obstruct them for reasons and on conditions that seem good at the moment should be subject to revision when changed conditions demand. The right reserved by Congress to alter, amend, or repeal is based on this principle: but actual experience of what happens with indeterminate public-utility franchises proves that they are in the vast majority of cases practically perpetual. Each right should be issued to expire on a specified day without further legislative, administrative, or judicial action.
>
> * * * * *
>
> Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to renew or extend the

BEST COPY AVAILABLE

concession in accordance with the conditions which may prevail at that time.

The concern articulated by President Roosevelt is reflected in the Federal Power Act, which limits licenses to fixed periods not to exceed fifty years. By doing this, Congress intended a periodic reconsideration of projects. For example, although the primary emphasis in 1920 was hydropower development, Congress also provided in that law and again in 1935 and 1978 for incorporation of consideration of non-power benefits in licensing decisions. This concern for aspects other than power has received increasing attention as part, of the relicensing controversy. Indeed, former Chairman Raymond J. O'Connor testified that (Hearings, *supra*, pp. 957-959):

> The Commission and the courts have held the Section 10(a) standard to be *broad public interest standard, requiring consideration of all factors affecting the public interest.* These factors may include such considerations as the applicant's ability to maintain and operate the project; impacts on navigation, flood control, and irrigation requirements; economic impact on the applicant's ratepayers; resource conservation, fish and wildlife protection, recreation and aesthetic considerations, need for power, water quality control, protection of improvements along the reservoir shoreline, hydraulic coordination; impacts on drinking water and other municipal and industrial uses of the waterway, and dam safety and adequacy.
>
> This list suggests that a wide variety of public interests must be protected by the Commission when it considers relicensing a project. *For any given project, some of these factors may* be more important, *and therefore are given more weight, than others.* The current Section 10(a) standard gives the Commission the *flexibility* to assess each project individually, determining and balancing what factors are most critical to the public's interest in the specific waterway at issue. *As the public interest changes over time, the Commission's considerations under the section 10(a) standard likewise change, encompassing new criteria or reevaluating the weight given established criteria.* [Italic supplied.]

In addition to these concerns, the Committee has been guided by the interests of consumers who benefit from hydro projects. Hydropower is the lowest cost source of electricity. Ratepayers benefit from these projects in the form of lower rates. Loss of the project could adversely affect their rates. Thus, it is in their interest that projects not change from one licensee to another without a sound and fair process.

In developing the legislation, the Committee has been keenly aware of the variety of these interests and has fashioned a bill that protects those interests.

### PREFERENCE

In 1920, the Federal Power Act (originally the Federal Water Power Act of 1920) was enacted. Congress generally embodied President Roosevelt's views in that law by authorizing the Federal

Power Commission (now the Federal Energy Regulatory Commission (FERC)) to issue licenses with fixed terms to non-Federal public and private entities for the construction and operation of hydroelectric facilities "across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power" from Federal dams. Thus, FERC has the primary authority over the permitting, licensing, relicensing, and exemptions from licensing of these facilities by non-Federal entities.

Under the Act, licenses may be awarded for a term not to exceed fifty years, with the United States having the right to take over a project at the end of a license term upon payment to the existing licensee of the net investment value of the project. If the United States does not take over a project, the Commission is authorized to issue a new license for another term to the existing licensee or to a new licensee. If the license is transferred, the new licensee must pay the net investment value of the project, which is typically small considering that the existing licensee has been able to recover its investment in the project over the course of the initial license term. All licenses are issued under conditions established under section 10(a) through (i) of the Act.

Section 10(a) of the Act specifically requires the Commission to issue an original license for a project to the applicant whose plan is "best adapted to develop, conserve and utilize in the public interest the water resources of the region. . . ." As noted earlier, this standard has been interpreted by the courts to require the Commission to consider a broad range of interests, including power development, need for power, recreation, fish and wildlife, flood control, irrigation and so forth. In the event the Commission finds that two or more applications are equally well adapted (i.e., there is a tie), section 7(a) of the Act requires the Commission to give preference to the application submitted by a State or municipality (i.e., the tie-breaker). Under the Act's licensing scheme, the Commission has issued hundreds of licenses for hydroelectric projects, the majority of which has been issued to investor-owned utilities.

As a number of the original licenses issued by the Commission began to expire, the question initially arose in the 1970s and again in this decade whether the "preference for States and municipalities" in section 7(a) applied to a proceeding under section 15 when an existing license expired. The Commission has issued conflicting interpretations of the relevant provisions.

On June 27, 1980, in the *Bountiful* case, the Commission ruled that the preference for States and municipalities applied in proceedings under section 15. That holding was affirmed by the Court of Appeals for the Eleventh Circuit. The United States Supreme Court denied petitions for *certiorari*. Three months after the Supreme Court's action, the Commission reconsidered the issue of the application of preference in section 15 proceedings and ruled, this time in the "*Merwin*" case, that preference did not apply. A three judge panel of the United States Court of Appeals for the District of Columbia Circuit reversed the Commission's ruling and indeed,

BEST COPY AVAILABLE

criticized FERC for relitigating the issue (see *Clark-Cowlitz Joint Operating Agency* v. *Federal Energy Regulatory Commission, et al*, No. 83-2231 (1985)). However, in January 1986, the same court, sitting *en banc*, vacated that decision and agreed to reconsider the case. Thus, the judicial controversy over whether, in the case of a tie, this "tie-breaker" applies is still not ended, and no end is expected soon.

There is significant interest in resolving the question definitively because of the large number of licenses which will expire in the next decade or more, because of the uncertainty created by the issue and because of the value of the resource and the risks associated with the possible need to replace or increase some or all of the generating capacity through construction. These licenses, the substantial majority of which are held by private utilities, involve projects which together have an installed capacity in excess of 3,600 megawatts. As Chairman O'Connor said at the Subcommittee's July 30, 1985, hearing on this legislation, "the hydroelectric resource is reliable, flexible and renewable. Consequently, licenses to operate hydroelectric projects are important not only to the project operators to serve their customers, but also to the general public. License renewals for existing projects are perhaps even more highly coveted than initial licenses to construct and operate new hydro-electric facilities. By the time a license comes up for renewal, the project has been operating for 30 to 50 years and is substantially, if not fully, depreciated. The cost of the power generated represents little more than operation and maintenance expenses" (Hearings, Ser. No. 99-33, p. 955).

Because of the attractive nature of this resource, private utilities with hydropower licenses are concerned that municipal utilities, equally attracted to these low cost projects, will take over their projects if the municipal preference is ultimately found to apply to relicensing proceedings under section 15 of the Federal Power Act. Such takeovers obviously could have adverse effects upon the consumers or ratepayers of those losing utilities and obvious benefits for the ratepayers of the winning utility. Public power utilities, on the other hand, argue with equal vigor that the policies and principles of the Act are the very fabric of the law and should not be cast aside easily. They note that since 1970, over 130 licenses have expired and none have changed hands.

The Committee, after long consideration of the matter in two Congresses, believes that a legislative solution to resolve the confusion is needed. The ambiguity surrounding the issue and the resultant litigation has brought the process to a near standstill. It is impacting on utility planning and creating needless uncertainty. Waiting for a final judicial resolution will not likely cause the issue to pass, whichever way the courts ultimately decide. Congress must decide.

The Committee has resorted to a process that seems more consistent with the Roosevelt view of providing for review and revision "when changed conditions demand." Like Roosevelt and the Congress in 1920, our purpose is not to perpetuate a license in the hands of any utility, but to provide that each utility compete in a process of striving for improvements under rigorous tests administered fairly and effectively by FERC that will better serve the

BEST COPY AVAILABLE

Nation and consumers and, if they fail those tests, to provide for a license transfer to one better qualified.

To accomplish this, the Committee decided to deal with the preference issue in two ways. First, the Committee amended section 7(a) of the Federal Power Act to ensure and reaffirm retention of preference in original licensing and to make it clear that there is no Committee interest in affecting that fundamental precept of the 1920 law. Second, the Committee restructured the relicensing process to restrict the preference to original licensing and to make it fair, more competitive, reasonable and more protective of the consumer and the environment.

In deciding what rules should apply, the Committee's primary concern was to establish procedures which would benefit consumers while also striking a fair balance between the interests of investor-owned and public utilities. After evaluating many approaches, including an explicit or *de facto* preference for existing licensees, the Committee decided that the stimulus of competition would result in the best proposals for the use of these projects. But if no competition existed, the Committee approach ensures that an existing licensee will not be "rubber stamped," but must again prove that its project qualifies as "best adapted" on power and non-power grounds.

Both investor-owned and municipal license holders appear to support this approach, generally agreeing that licenses should not be transferred upon the expiration of an existing license unless another applicant submits a better proposal for the project. The investor-owned licensees argued that if the preference provisions of section 7 are applied in proceedings under section 15, a municipal competitor must only submit a plan that is "equally well adapted," thus eliminating any incentive on the part of the challenger to submit a plan that would better serve the public interest. Such equality triggers preference and a transfer could occur. The Committee structured the legislation to eliminate the potential for so-called "ties" on procedural or substantive grounds and to require the Commission to award the license to the applicant submitting the superior application from the standpoint of promoting the public interest, or, where no challenge, to the existing licensee if, and only if, its proposal qualified under the same rigorous public process.

In adopting this approach, the Committee explicitly rejected providing any applicant, or class of applicants, a preference in relicensing. The Committee believes that this process will result in significantly different proposals, each emphasizing a different mix of power development, recreational uses, environmental protection and enhancement, energy conservation, and other factors. Each applicant, whether challenged or not, will be required to rely on the merits of its application, rigorously considered by FERC under the glare of the public eye, to receive a new license.

The Committee is convinced that this approach is fair to all parties and offers the most benefit to consumers. It should eliminate the concern of the private utilities that their consumers would face significant rate increases because of fear that the application of municipal preference would result in the wholesale transfer of li-

BEST COPY AVAILABLE

censes. All applicants will stand on equal footing in terms of obtaining a new license.

The decision to restrict the municipal preference to original licensing has unfortunately rekindled the emotional debates between public power systems and the investor-owned utilities. Public power and rural electric cooperative systems have expressed grave concern that this could be the first step in an assault on their preference or first right of access to federally generated hydroelectric power.

The Committee notes that in 1980, there were similar concerns that somehow the Pacific Northwest Electric Power Planning and Conservation Act might be construed to change the meaning of another preference to purchase federally-generated electricity by public bodies and rural electric cooperatives in the Northwest, and by precedent, nationally. Then, as now, the fears of the "publics" and "cooperatives" were that this is the "beginning" of an assault on "preference." At that time, the Committee's report (H. Rept. 96-976, Part I, May 15, 1980, p. 34) emphatically said:

> The Committee does not want to undo nearly 80 years of history or establish any precedent.

The Committee has not changed its view since 1980. This legislation is limited to a specific problem, namely "preference in relicensing." We have sought to rsolve a controversy for future cases, as well as those now pending at FERC, while clearly holding inviolate the preference to original licensing. It is not intended today as a "beginning" or a "precedent" for a later assault on the preference, any more than was it in 1980.

The issues addressed by this legislation are separate and distinct from the issue of Federal power marketing. The action of the Committee resolving the statutory ambiguity in favor of maintaining application of municipal preference only in original proceedings should in no way be construed as an endorsement of, or precedent for, an attempt to change this or any other statutory preference in favor of States or municipalities. Further, the Committee understands from the investor-owned utilities that their goal is to revise the provisions of the Federal Power Act applicable to the issuance of new licenses after the expiration of an existing license, not to alter any other statutory preference.

### MERWIN DAM CASE

The Committee amendment expressly provides that the bill shall not apply to the FERC proceeding involving the Merwin dam case which the full Court of Appeals plans to rehear. The Committee stresses that it has not endorsed or rejected any interpretation that has been given section 7(a) of the Federal Power Act as to the application of preference in relicensing. The Committee's adoption of H.R. 44 demonstrates only that it is time for Congress to declare a clear and unambiguous policy for the future, taking into consideration today's knowledge of the utility industry and the concerns of all consumers. The issues before the court in the Merwin case are not intended to be resolved or affected by this bill. We do not interpret the law as it exists today, nor do we urge the court to decide

BEST COPY AVAILABLE

for or against the existence of preference. The courts must resolve the matter without regard to H.R. 44.

FISH AND WILDLIFE AND OTHER NON-POWER VALUES

Although section 10(a), as interpreted by the courts and FERC creates a broad public interest standard, the "flexibility" approach identified by Chairman O'Connor has not adequately addressed fish and wildlife issues. More often than not, this "flexibility" devised by the Commission and the "weighing" of factors so some "are given more weight than others," have resulted in non-power resources being treated as secondary concerns. Cumulative impacts of several projects on a waterway are too often ignored. In more than one case, licenses were issued and concrete poured before fundamental concerns for instream flows, fish and wildlife protection, recreation, and energy conservation were even addressed. For example, in *Confederated Tribes and Bands of the Yakima Indian Nation, et al* v. *F.E.R.C,* 734 F.rd 1347 (1984), the Yakima tribe and the National Marine Fisheries Service (NMFS) sued FERC for failing to comply with the Federal Power Act, the Fish and Wildlife Coordination Act, the Pacific Northwest Power Planning and Conservation Act, and FERC's own regulations in issuing a new license in a relicensing proceeding before resolving fishery issues involving the Columbia River. FERC contended that the license contained a "reopener" clause which would allow FERC to impose fish measures when studies under a separate license proceeding were completed. But the court disagreed. A "reopener" clause which can only be used in a "modification proceeding" would not suffice because, as the court noted, "modification proceeding is not the same as a relicensing proceeding" because "FERC may not 'amend' a license in a modification proceeding without the licensee's consent." The court held:

> The issue in this case can be stated rather simply: Can the Commission satisfy its obligations under the relevant statutes by deferring consideration and implementation of fishery protection measures until after licensing? While we are sympathetic with FERC's stated practical desire to resolve the fishery questions in a comprehensive proceeding covering all five of the Mid-Columbia Dams, *we hold that the statutes require FERC to examine fishery issues before issuance of a license.* [Italic supplied.]

In addition to inadequate consideration of environmental issues before authorizing construction, FERC appears to give too little weight in some cases to these concerns. License and exemption applications are not rejected by FERC because of their adverse environmental impact. The Commission has regularly resisted demands that it encourage less costly conservation alternatives. In short, FERC's treatment under the Federal Power Act and applicable environmental laws of energy conservation, fish and wildlife, recreation, and other non-power factors has been less than satisfactory. When section 10(a) is applied, these factors are generally given less weight than power production.

BEST COPY AVAILABLE

Over the past several decades there has been increasing recognition of the environmental problems caused by industrial, commercial and residential development. This recognition extends to a long awareness of the dangers to fish and wildlife from hydroelectric development. While landmark legislation has been enacted to address environmental concerns in other areas, the specific provisions of the Federal Power Act have remained largely unchanged since 1920, except for section 18 which was amended in 1935 to provide for "fishladders" in licensing and for section 30, added in 1978 by our predecessor Committee, regarding conduit facilities and related fish and wildlife matters. Consequently, as presently written, the Federal Power Act itself does not specifically ensure that hydroelectric development and operation proceeds in a manner consistent with fish and wildlife values, although other laws, such as the National Environmental Policy Act of 1969, the Endangered Species Act, and the Fish and Wildlife Coordination Act have supplemented the Federal Power Act to require FERC to provide greater recognition of these values. While recent Commission actions under Chairman O'Connor demonstrate improvement, the Commission has not always displayed sufficient concern for the non-power aspects of hydropower development. Moreover, as Commission members change, so too does FERC's attitude toward these aspects.

This concern was discussed in a February 11, 1986, letter from the Legislative Counsel, Mr. Wesley F. Hayden, of the International Association of Fish and Wildlife Agencies. In support of the Committee bill, Mr. Hayden said:

> Nationally, hydroelectric development has impacted fish runs both by eliminating access to former spawning and rearing habitat with impassable barriers and reservoirs, and by killing both upstream and downstream migrants passing dams each season. For example, in the Columbia River Basin, between the 1930's and the 1970's the accessible habitat available for spawning by anadromous fish was reduced by approximately two-thirds. Certain upriver stocks became extinct as a result, while others were transferred into the remaining habitat. During the same period, the commercial, recreational, and Indian tribal Columbia River salmon harvests also declined significantly.
>
> * * * * *
>
> Given the critically depressed status of some of the Nation's anadromous fish runs, the sense of urgency implicit in many of these issues is well deserved. The common thread runing throughout is the need to protect and restore fish and wildlife, particularly anadromous fish runs. Reduced harvest, increased production, hatchery supplementation, and protection from future hydroelectric development will all contribute in some measure to this goal.
>
> However, these factors cannot by themselves or in combination overcome the influence of current hydroelectric impacts. Unless the problems associated with existing hydroelectric projects are resolved, the futility of these other initiatives will soon become apparent. Over time, the

result would be the extinction of anadromous fish in certain streams.

The situation that now exists is a direct result of the Federal Power Commission (FPC), and now the Federal Energy Regulatory Commission (FERC), implementing the Federal Power Act with little regard for the economically and socially important fishery resources of the nation. FERC has seemingly operated under the assumption that there was an obligation to issue a license for a project regardless of the broader public interest, and has not considered fishery mitigation as a "cost of doing business" for hydroelectric projects. Fisheries agencies and Indian tribes are now faced with trying to implement "after-the-fact" fish protection measures for hydroelectric projects which were originally authorized without adequate instream flows and fish passage facilities designed to protect valuable fishery resources. At the same time, we are faced with hundreds of new project proposals, sometimes as many as 20-70 in a river basin, many of which are damaging to valuable fishery resources.

In the course of hearings in the 98th Congress and this Congress on relicensing and the small "hydro" program, national conservation organizations as well as State and Federal fish and wildlife agencies, Indian tribes, and others earlier expressed concern about the course of hydro development at FERC and its impact on fish and wildlife. Speaking for the Water Resources Committee of the International Association of Fish and Wildlife Agencies, Mr. Edward G. Horn testified (Hearings, Ser No. 99-33, pp. 85, 91-92):

> Hydroelectric development in the United States has had a major impact on fish and wildlife resources. The adverse effects of project development and operation has included the loss of entire populations of animals and destruction of irreplaceable habitat; however, some properly-developed projects have produced beneficial effects such as the creation of important new habitat and new opportunities for utilization of expanded populations of fish and wildlife. Minimizing or avoiding adverse impacts and exploiting the opportunities for fish and wildlife enhancement that may be associated with hydroelectric developments are important resource management responsibilities to which the Federal Energy Regulatory Commission (FERC) is required, by law, to be responsive.
>
> * * * * *
>
> Over the past few years, we and others have argued that federal licensing and exemption regulations should be revised to encourage federal and state resource management agencies and the Commission's environmental staff to expand the scope of site-specific reviews sufficiently to assess the intra-basin cumulative effects of all hydroelectric projects. The need to examine the relationship of numerous back-to-back hydroelectric operations before approving a new project is readily apparent. For example, the spillage requirements at each site must be adjusted,

BEST COPY AVAILABLE

> site by site, to assure that downstream industrial users, municipal water systems, recreational users, and hydroelectric generation is not precluded or significantly impaired. From a resource management standpoint, there is concern that sites could be developed without provision for adequate base flows and/or fish passage facilities essential for the maintenance or reintroduction of anadromous fish runs into river systems they have historically frequented. In addition to fishing, other recreational opportunities, such as canoe routes, could be foreclosed if cumulative impacts are not examined before approving any new projects on a river system.

In addition, Mr. David R. Conrad of Friends of the Earth spoke about what he called the historic bias of the Commission against the protection of non-developmental amenities associated with the nation's waterways, and the serious problems which this bias has caused and may yet cause for natural resource management. He said (Hearings, *supra*, pp. 110–114):

> During the period since the last relicensing hearings, our feelings have become all the more firm that conditions in the Commission's handling of hydropower generally are a matter of serious concern still. Since then, several major court decisions have come down on all phases of the Commission's hydropower program showing, we believe, that the Commission has been giving inadequate treatment to environmental values in the course of implementing its responsibilities.
>
> In the *Escondido* decision the Supreme Court affirmed that the Commission is bound by law to accept the terms and the conditions from Federal land managers to protect resources for projects on Federal lands. That overturned the Commission's view that this was discretionary on the Commission's part.
>
> In the *Tulalip* decision the Court found the Commission had reached too far in its exemption program in allowing new diversion projects to be included.
>
> In the *Yakima* case at Rock Island Dam, . . . the Commission was reversed in its relicensing decision because it had failed to adequately consider fisheries matters prior to issuing the license and also had failed to prepare an environmental impact statement.
>
> Just last month, again the Commission was reversed by the courts on the Winchester Dam in an exemption case for failure to give adequate consideration to fisheries and failure to prepare an environmental assessment or impact statement.

These and other witnesses urged that the relicensing legislation address these concerns and provide greater protection and enhancement for fish and wildlife.

The bill, as reported by the Committee, seeks to meet those concerns by including provisions designed to place fish and wildlife on a par with hydro development in original licensing and relicensing

BEST COPY AVAILABLE

and in the granting of exemptions for new dams and diversions qualifying for PURPA benefits. The Committee believes that the Federal Power Act should be better harmonized with today's environmental values. In reviewing the current provisions of the Act, however, the Committee found that a major rewrite of the Act was not required. Judicial decisions interpreting the Act, including the *Confederated Tribes of the Yakima Nation* v. *FERC*, 746 F.20 466 (9th Cir. 1984), *cert. denied*, —— U.S. —— (1985), *Tulalip Tribes of Washington* v. *FERC*, 732 F.20 1451 (9th Cir. 1984), *Escondido Mutual Water District, et al.* v. *La Jolla Band of Mission Indians*, 104 s. ct. 3562 (1984), and *The Steamboaters* v. *FERC*, 759 F.20 1382 (9th Cir. 1985) cases, have, as noted by Mr. Conrad, provided some guidance and redirection to the Commission. The legislation does not alter these and similar judicial decisions on the Commission's hydro program. The Committee intends that the Commission should adhere to the mandate of these cases.

Similarly, the bill does not amend or change the Fish and Wildlife Coordination Act, NEPA or other environmental laws. It addresses and clarifies FERC's procedures and decisionmaking to ensure that those laws are fully met.

The Committee also is encouraged by the efforts made by FERC, based on these decisions, to give great emphasis to the "non-developmental amenities." One example, is the "Cluster Impact Assessment Procedure" (CIAP) now being followed by the Commission in the Snowhomish River Basin in Washington, the Salmon River Basin in Idaho, the Owens River Basin in Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia, and West Virginia. The Committee applauds the Commission for its cluster impact assessment procedure as a worthwhile step in the direction of comprehensive planning, but, the Committee also believes that comprehensive planning requires an assessment of the combined effects of all projects on a waterway, including projects exempted from licensing, and that the Commission should revise its procedures accordingly. Another example is FERC's decision last January to resolve competition for a hydro license on the Chateaugay River in New York on the basis of the impact on the "aesthetic and scenic" values of importance to the area.

The principal areas the Committee believes are in need of reform involve the treatment of fish and wildlife and other environmental values, the role of the expert agencies in recommending under the Fish and Wildlife Coordination Act for establishment by FERC of fish and wildlife conditions, the Commission's authority to enforce protective conditions, and the environmental impact of new dams or diversions on waterways. The legislation includes provisions to reform the FERC process in these areas.

One reform is to amend the Act so that the purposes of protection, mitigation of damage to, and enhancement of, fish and wildlife are given "equitable treatment" with the development purposes of the Act. The provision is intended to remedy the existing imbalance and to ensure hydroelectric development and operation only proceeds in a manner consistent with maintaining fish and wildlife values. Power development is not to be considered an absolute priority under the Act or given undue weight. It is intended that the Commission give significant attention to, and demonstrate

BEST COPY AVAILABLE

a high level of, concern for all environmental aspects of hydropower development, even, if necessary, to the point of denying an application on environmental grounds. Moreover, the Commission is to apply in its proceedings this concern and scrutiny to all projects, whether licensed or exempted, original or otherwise. The Committee recognizes that in some cases, these non-power values will not be given the same weight. FERC must examine the matter carefully and fully on a case-by-case basis and where it accords different weights to the various purposes, FERC must explain the basis and reasons for the weights given.

Another important reform is a specified procedure that FERC must follow in establishing "conditions" for a license, permit, or exemption "to adequately protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat") that are "affected by the development, operation, and management" of a hydro project. The bill clearly and unmistakably upgrades the status at FERC of recommendations of the National Marine Fisheries Service, the United States Fish and Wildlife Service, and the applicable State fish and wildlife agencies under the Coordination Act. Their role is not a veto over a project, nor a change of their authority or duties under that law. But it is one of requiring heavy reliance and acceptance by FERC, except in limited circumstances, of the recommendations of these expert agencies. It is a procedural change at FERC with substantive effect.

Additional reforms have been included to increase the Commission's enforcement authority and to require the Commission to include conditions in licenses to protect, mitigate damage to, and enhance, fish and wildlife. The legislation makes needed changes to ensure that the agencies with expertise in this area have a substantial role in designing through their recommendations the appropriate license terms and conditions.

The bill preserves, with one amendment, section 10(a) of the Federal Power Act relating to comprehensive planning, which is fundamental to achieving a national and orderly program of hydropower development consistent with the need to protect and enhance non-developmental values. Such plans must be developed in the original and relicensing process, based on a thorough inventory of the resources of the river basin and an evaluation of the present and anticipated demands for those resources. Such plans must be current and not be out-of-date the minute they are developed and released.

The legislation also addresses the concern expressed by many, including representatives of environmental groups and local residents, over the increasing number of preliminary permits and license applications involving new dam or diversion projects of not more than 80 megawatts in size. According to testimony presented at our hearings, these projects have been primarily stimulated by the availability of benefits under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) which requires electric utilities to purchase the electric energy produced by (and sell backup electric power to) qualifying small power production facilities. The term "small power production facilities" is defined in section 3(17) of the Federal Power Act to include a facility which produces electric energy solely by use of renewable resources. The

BEST COPY AVAILABLE

Commission has interpreted this definition to extend section 210 benefits to projects utilizing new dams or diversions.

The Committee is very concerned about this interpretation, which we do not endorse, and about the need to more adequately assess the impact of new dam or diversion projects, including the need, nationally and regionally, for the power they provide. The legislation limits the availability of PURPA benefits for new dams or diversion projects to only those which meet certain specified environmental conditions, and also requires the Commission to undertake a study of this issue and report its findings to Congress. To prevent further possible environmental harm while the study proceeds, the legislation directs the Commission to cease accepting applications for preliminary permits (and licenses where preliminary permits have not issued) as of December 31, 1985. The Commission is further directed to suspend preliminary permits issued prior to that date (and those issued after but which were applied for before that date) during the pendency of the study unless certain specified circumstances exist.

The legislation recognizes that some developers have relied on existing law and have committed substantial sums and efforts in an effort to obtain a license or exemption. There are special provisions in this section recognizing the equities in these cases.

### ENERGY CONSERVATION

While energy was abundant and cheap not many years ago, it is no longer considered inexpensive even though oil and gas prices have been rapidly declining in recent months. All should be wary of that decline continuing or being maintained at such low levels. The Nation remembers the 1970s, when prices climbed quickly, supplies dwindled, and conservation in portions of the country was not practiced. We were caught by surprise. That should not happen again.

The tremendous value of hydroelectric energy today, because of its low cost, has not always been fully anticipated or recognized. Therefore, the legislation amends the Act to require that the purpose of energy conservation be given equitable treatment with the other purposes of the Act. It is a principle initially enunciated in 1978 and again in 1980 by the Committee and the Congress. The Committee intends that the Commission will ensure that those who receive original licenses, or are permitted to get new licenses on relicensing, or are permitted to get new licenses on relicensing, or are granted license exemptions, will initially consider energy conservation among energy supply alternatives.

### COMPENSATION

The Committee believes that the current standard of compensation in the event a license is transferred may not adequately reflect the value of a license to the existing licensee's ratepayers. Under current law, if a license is transfered, the new licensee is required to pay to the existing licensee the "net investment" value of the project. Although this provision has not been interpreted by FERC or the courts, the general consensus is that this amount represents

BEST COPY AVAILABLE

the investment of the existing licensee in the project less accumulated depreciation.

Consumers of a utility with a hydro license have experienced the benefit of the license in the form of lower rates or, at least, no rate increase. If a license is transferred, these consumers could be faced with rate increases that could be significant. On the other hand, the customers of the new licensee could experience a decrease in rates.

In an effort to mitigate possible economic dislocations, the Act is amended to permit the Commission in certain cases, to award additional compensation above the current net investment amount. The Committee intends that this amendment will not impair or frustrate the competitive approach embodied in this bill by discouraging potential applicants from submitting applications. The amendment, therefore, requires the Commission to implement the new compensation provision in a manner that does not discourage competition for licenses.

### NEW LICENSEE ACCESS

The Committee recognizes that if a license is transferred, the new licensee may need services, including transmission services, from the existing licensee in order to realize the benefit of obtaining a license. To prevent a new licensee from obtaining a license but not enjoying the benefit of the license, the Committee believes that, if necessary, services should be provided by the existing licensee to the new licensee, and that the Commission should have authority to ensure that necessary services are provided at the proper price.

## HEARINGS AND STUDIES

On November 16, 1983, H.R. 4402, the predecessor bill to H.R. 44, was introduced by Congressman Shelby and a number of cosponsors. Hearings were held on May 17, 1984, by the Subcommittee on Energy Conservation and Power on that bill and on companion bills, H.R. 5299 by then-Congressman Ottinger, and H.R. 5416, by then-Congressman Gore. The witnesses included Members of Congress, representatives of public and private utilities, Indian tribes, environmental groups, Federal and State agencies, and many others.

Also in the 98th Congress, on September 11, 1984, the Subcommittee held an oversight hearing on FERC activities concerning the small hydro program, as well as on matters involving FERC activities in the Pacific Northwest. At that hearing, there was particular concern about the role of the NMFS in regard to FERC hydro matters.

On June 7, 1984, the Subcommittee held a hearing on S. 1132 and a companion bill, H.R. 3660, which related to the annual charges for projects licensed by FERC for the use of Federal dams. On September 24, 1984, the Committee reported S. 1132 concerning such charges and the role of the NMFS (See H. Rept. 98-1052). That bill passed the House, but died in the waning days of the 98th Congress. The annual charge and NMFS role provisions of S. 1132 are also included in H.R. 44 as reported by the Committee.

BEST COPY AVAILABLE

The Subcommittee on Energy Conservation and Power held three days of hearings (June 5, 25, and July 30, 1985) on H.R. 44, introduced by Representative Shelby, and on the related bills (H.R. 1815, introduced by Representative Matsui on March 28, 1985; H.R. 1959, introduced by Representative Miller of California on April 3, 1985; H.R. 2386, introduced by Representative Foley on May 7, 1985; and H.R. 2605, introduced by Representative Dingell on May 23, 1985). Testimony was received from over 30 witnesses, representing more than 24 organizations, with additional material submitted by 52 individuals and organizations. These included members of Congress, public and private power, environmentalists, fish and wildlife agencies, FERC, and many more.

Witnesses for public power, including Mr. Alex Radin, Executive Director of the American Public Power Association, testified that preference spurred competition in relicensing by providing municipalities an incentive to file a competing application. They criticized the "just" compensation standard of H.R. 44 and H.R. 1959 as requiring the payment of a windfall to the existing licensee because the value of hydro projects has increased substantially as a result of events (oil embargoes) not within the control of the existing licensee. Private power witnesses, led by Mr. Fred Mielke, Chairman and Chief Executive Officer of the Pacific Gas and Electric Company, charged that preference was anticompetitive, since it required the Commission to favor the application of one set of applicants over another based on their governmental status rather than solely on the mertis of their applications. They claimed that the application of municipal preference in relicensing would cause rate shock to the consumers of private utilities.

Environmental witnesses complained that most hydro projects were originally licensed prior to the passage of the environmental laws and without knowledge of the impact these projects would have on fish and wildlife. These same witnesses explained the need to revise the Federal Power Act to ensure that in licensing and relicensing projects, the Commission had the necessary authority to protect, mitigate damage to, and enhance fish and wildlife and related spawning grounds and habitat.

At the request of the Subcommittee Chairman, the Congressinal Research Service provided the Subcommittee with a detailed analysis of the issues and the pending legislation. In addition, to more accurately assess the impact of the transfer of licenses from private utilities to public utilities, the Subcommittee Chairman requested the General Accounting Office to analyze the estimates prepared by the Pacific Gas and Electric Company and by Beck Associates regarding the four PG&E projects, involved in competitive proceedings. The GAO concluded that the cost to PG&E, in terms of replacing the power from these projects, would be approximately $105 million annually. The GAO did not determine whether PG&E would be required to replace this power.

### Committee Consideration

Following the hearings, several Subcommittee Members and other Members, under the leadership of Subcommittee Chairman Markey and the Subcommittee's Ranking Minority Member, Con-

BEST COPY AVAILABLE

gressman Carlos Moorhead, spent considerable time and effort to deal with the many and complex issues presented by this legislation. The principal sponsors of the bills, Representatives Shelby, Dingell, Matsui, and Miller of California and other Members participated in this process, along with Committee Members, such as Congressmen Nielson and Dannemeyer. Extensive follow-up discussions were held with representatives of public and private power, environmentalists, small hydro developers, and others. The joint effort resulted in a substitute amendment which was later adopted by the Subcommittee. This occurred during markup by the Subcommittee on Energy Conservation and Power which met on November 21, 1985, December 13, 1985, and January 29, 1986, in open markup session to consider H.R. 44. The Subcommittee ordered H.R. 44 reported on January 29, 1986, as amended, by voice vote, a quorum being present. On February 6, 1986, the Committee met in open markup session and ordered H.R. 44 reported, as amended, by voice vote, a quorum being present.

## Committee Oversight Findings

Pursuant to clause 2(l)(3)(A) of Rule XI of the Rules of the House of Representatives, the Subcommittees on Energy Conservation and Power and on Oversight and Investigations of this Committee have conducted extensive oversight of FERC activities under the Federal Power Act, with the help of the General Accounting Office and the Department of Energy's Inspector General (IG). On September 18, 1985, the Inspector General issued a report entitled "Assessment of Charges Under the Hydropower Licensing Program."

The report is critical of FERC's failure to recover the Government's administrative costs, as required by law, "associated with the hydropower licensing program" from licenses, permittees, or exemptees. The report notes particularly that "about $6 million" in costs incurred in one fiscal year by the Forest Service have not been recovered. Presumably, that figure would grow substantially if costs incurred for fiscal years 1980 to the present were added to this figure.

The IG also said that as long as 1981, the IG reported that FERC's land use charges "were unreasonably low and inequitable." The then FERC Chairman reportedly made the observation that FERC could not change this situation without first changing the applicable regulations. He apparently said he would "have his staff look into making the necessary changes." But the IG now reports that after four years the applicable regulations "still" have not been revised. As a result, FERC has been undercharging hydro projects by "about $15.2 million annually," or about $60.8 million for fiscal years 1982 through 1985. Of that sum, $38 million was lost to the Treasury and the remainder was lost by the States.

In an October 25, 1985, reply to the Subcommittee, Chairman O'Connor said:

> I share your concerns about the issues raised in the Inspector General's report. While I cannot prejudge the outcome of any proposed rulemaking, we are actively pursuing proposed changes in both the administrative and government land use charge assessment methods. I place a

BEST COPY AVAILABLE

high priority on this matter, given the length of time this matter has been pending before the Commission.

The Commission can include federal agencies' costs in this year's administrative charge billings without any change in our regulation. We will therefore include these costs in our fiscal year 1985 administrative charge bills. To accomplish this, the Commission has formally requested each of the agencies identified in the Inspector General's report, as well as two additional agencies within the Department of the Interior (Bureau of Reclamation and Bureau of Indian Affairs), to provide us with its FY 1985 costs by November 15, 1985. We have requested the agencies to break out their costs by specific activity, the hydropower application involved, and municipal status of the applicant. As I am sure you are aware, billings for annual charges are only made to licensees; permittees and exemptees are not billed for annual charges.

* * * * *

Turning to the second issue raised in the IG report, on August 6, 1985, I directed the General Counsel to prepare a Notice of Proposed Rulemaking to modify the regulations to reflect revised land values and interest costs. I expect the Commission to be able to consider this proposal before the end of this year, and to have the revised final regulations in place no later than one year from today.

As a result of the increased hydropower activity at the FERC, we have seen significant increases in the annual charges in recent years. These increases have generated extensive correspondence with licensees who have requested explanations of the increases. We can expect that increasing these charges still further may encourage challenges to them. As a result, the proposal to revise the land values and interest rates may generate extensive comments and may require public hearings.

* * * * *

I agree with you that the delay which has occurred since 1981 is unacceptable. I can personally offer no explanation to you other than that I was unaware of this issue until the IG presented his draft report to the Commission staff last spring. I have attempted to move forward on this matter since then, and will seek to implement the needed changes without delay.

The Subcommittee is also investigating FERC's enforcement program, including the informal nature of that program and FERC's policies of non-public disclosure of enforcement activities.

### Committee on Government Operations

Pursuant to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

BEST COPY AVAILABLE

## COMMITTEE COST ESTIMATE

In compliance with clause 7(a) of rule XIII of the Rules of the House of Representatives, the Committee believes that the bill will have no budget effect for fiscal year 1986 because, under the bill, there is no authorization for spending in this fiscal year. Any increased costs in carrying out the bill in subsequent years will be largely offset through the collection of fees by the Commission pursuant to increased annual charges on hydroelectric projects. Thus, we believe the bill will have no net impact on federal outlays.

## CONGRESSIONAL BUDGET OFFICE ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, February 27, 1986.*

Hon. JOHN D. DINGELL,
*Chairman, Committee on Energy and Commerce, House of Representatives, Rayburn House Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 44, the Electric Consumers Protection Act of 1985, as ordered reported by the House Committee on Energy and Commerce, February 6, 1986. This bill amends current law regarding the terms and conditions applicable to hydroelectric projects licensed or regulated by the Federal Energy Regulatory Commission (FERC). CBO estimates that enactment of this bill would result in no net cost to the federal government over the long term, because any additional costs would be offset by an increase in receipts from fees on hydroelectric projects.

H.R. 44 revises federal policies for relicensing existing hydroelectric plants. Although public power agencies are given preference for an original license, such preference would not apply when a project is relicensed. The bill directs FERC to issue the license to the applicant whose proposal best suits the public interest, as defined by the criteria in the bill. In cases where a license is awarded to an applicant other than the existing license, the bill provides guidelines and procedures to resolve service and compensation issues. Special procedures are included for resolving issues involving nine relicensing cases currently subject to litigation.

The bill modifies the standards and procedures for issuing new licenses and expands FERC's authority to enforce license stipulations directly. Other provisions require FERC to conduct a study, report to the Congress, and revise its regulations on whether certain small hydroelectric facilities should qualify for the benefits available under the Public Utility Regulatory Policy Act. FERC may not accept applications for permits for certain small power plants until at least 180 days after the agency has reported to the Congress and revised the regulations. Also, permits issued prior to December 31, 1985 would be suspended temporarily, unless FERC determines that certain environmental and other requirements have been met.

Finally, this bill revises current policies regarding the amount, payors, and interagency transfer of FERC's annual charges on hy-

BEST COPY AVAILABLE

droelectric projects. It also ratifies FERC's current fees for the use of government dams or structures.

It is assumed for this estimate that the bill would be enacted by June 1986 and that all funds authorized would be appropriated prior to the beginning of each fiscal year. H.R. 44 would have no effect on spending in 1986, because the provisions in the bill that authorize spending do not become effective until after September 30, 1986.

CBO estimates that enactment of this bill would increase FERC's costs by an average of about $1 million a year over the 1987–1991 period, but that these increases would be offset in each subsequent year by a corresponding increase in FERC's receipts from the annual charges on hydroelectric projects. Thus, over the long-term, enactment of the bill would have no net impact on federal outlays.

The provisions requiring FERC to issue regulations and complete studies would increase agency spending by an average of about $400,000 a year in fiscal years 1987–1989. The impact of expanding FERC's activities in relicensing and licensing procedures is very uncertain, because it will depend on the number and complexity of these projects. CBO estimates that these additional responsibilities would increase FERC's costs by an average of about $600,000 a year over the next five years, assuming that the workload continues at current levels. Suspending action on permits for certain small hydroelectric facilities during the study period would have no significant net budget impact, but would shift the cost of processing these applications from fiscal years 1987–1989 to the 1990–1991 period. Finally, requiring FERC to transfer funds it collects for other agencies to those agencies would have no net effect on federal outlays.

Other provisions in the bill are expected to have no impact on federal outlays during fiscal years 1987–1991.

CBO estimates that the bill would have no significant impact on the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD GRAMLICH
(For Rudolph G. Penner, Director).

## INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee makes the following statement with regard to the inflationary impact of the reported bill: The Committee does not believe that an inflationary impact on the economy will result from the passage of H.R. 44.

## SECTION-BY-SECTION ANALYSIS AND DISCUSSION

### SECTION 1.—SHORT TITLE

This section provides that the short title of H.R. 44 is the "Electric Consumers Protection Act of 1985."

BEST COPY AVAILABLE

SECTION 2.—AMENDMENTS TO SECTION 7

This section amends section 7(a) of the Federal Power Act to strike any reference to new licenses issued under section 15 of the Act relating to the relicensing of hydro projects and to make it clear that the preference provisions of section 7(a) only apply to preliminary permits and to original licenses for hydro power projects. This clarification of the law, which the Committee again stresses should not be viewed as a precedent with regard to the preference provisions of this section or in other law, takes effect immediately with respect to each license or permit issued under section 15 after enactment of H.R. 44, except in the case of license proceedings subject to sections 10 and 12 of the bill.

It is the intent of the Committee in adopting this amendment to establish this policy without regard to the outcome of litigation for the FERC proceeding subject to section 12 of the bill. The Committee does not intend to suggest or imply by this amendment that we agree or disagree with FERC's or the court's interpretation of section 7(a) of the Federal Power Act as it exists prior to enactment of this bill.

SECTION 3.—ENVORONMENTAL CONSIDERATION IN LICENSING

This section amends section 4(e) of the Federal Power Act to provide that FERC shall, in considering a project application, give "equitable treatment" to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality. It also amends section 10(a) of the Act to ensure that the reference in section 10(a) to "other beneficial public uses" includes the purposes of the newly amended section 4(e) as well as recreational purposes.

The amendments clarify sections 4(e) and 10(a) to ensure that these other non-developmental values are fully considered on a project-by-project basis on a par with power development. The amendments elevate such pourposes to ensure hydroelectric development, management, and operation, once licensed, proceeds in a manner consistent with such purposes.

The term "equitable treatment" is derived from section 4(h) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980. It is a procedural, as well as a substantive standard, to be applied in all licensing. It compliments and confirms judicial holdings that non-power issues must be considered and resolved prior to an original or a new license being issued. It seeks to ensure that non-power values are, to the greatest extent possible, as healthy and as abundant after licensing and development as before.

The Committee recognizes that the circumstances of each licensing, exemption and permitting decision vary. If, for instance, it is determined that a project can economically produce needed power and also meet fish and wildlife needs after considering the project, not in a vacuum, but in relation to other projects on a waterway, then presumably a license would issue. As was recognized in the 1980 Act, licensing to serve power purposes should not be permitted on the back of fish and wildlife, recreational values, including

programs to restore fisheries, such as on the Merrimac and Connecticut Rivers in New England, or other similar values. In such cases, the Commission may be required to prohibit or restrict development in order to further the energy conservation, recreational, or fish and wildlife purposes of the Act. The Committee intends that the Commission will evaluate all license applications, including relicense applications, giving full and balanced consideration to all of the purposes and values promoted and protected by the Act.

The term "fish and wildlife" as used in this section and elsewhere in this bill is intended to be construed broadly (see for example, the definition of this term, 16 U.S.C. 1532(8) and 16 U.S.C. 3371(a). It applies to sport, as well as commercial, fisheries. It also applies to migratory and resident wildlife. In regard to the term "protection, mitigation of damage to, and enhancement," the Committee refers to its report of May 15, 1980 (H. Rept. 96-976, Part I) on the Pacific Northwest Electric Power Planning and Conservation Act of 1980 wherein we said:

> It has been suggested that the terms "protect, mitigates, and enhance" should be defined. The Committee did not choose to do so in recognition of the fact that these terms are not new to those concerned with this resource, and because such a definition might later prove more limiting than anticipated.
>
> At the same time, the Committee does not intend that these terms be construed in broad terms that biological and economic considerations will be totally ignored. They must be considered. However, cost should not be a deterrent if a fish and wildlife need might be sacrificed to save dollars.

Section 3 also amends section 10 of the Act by adding a new subsection (j) establishing a clear process for the inclusion in a license of fish and wildlife conditions based on recommendations made by fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act. This amendment does not relieve or diminish FERC's duties and responsibilities under sections 4, 10(a), 18, or 30 of the Federal Power Act with regard to fish and wildlife. Each will apply and compliment one another. Nevertheless, the specific provisions of this subsection will govern FERC's licensing activities.

The new subsection mandates that each license issued shall include conditions "to adequately protect, mitigate damages to, and enhance, fish and wildlife (including related spawing grounds and habitat) affected by the development, operation, and management of the project." The conditions for each project must be based, as required under present law, on recommendations received from the National Marine Fisheries Service, the United States Fish and Wildlife Service and the relevant State fish and wildlife agencies under the Coordination Act, which is not affected by this bill. To address concerns that the input from these agencies could be ignored or undervalued, the Commission may only reject, in part or whole, a recommendation of any of these agencies concerning any specific project after attempting to resolve the difference with the agencies and after publishing a finding (and reasons therefor) that such recommendation is inconsistent with the purposes and re-

BEST COPY AVAILABLE

quirements of the Federal Power Act. Such findings would be subject to judicial challenge. The provision, like a similar provision in the 1980 law, is intended to stress the expertise of these agencies and the need for FERC to rely on them, rather than try to develop its own expertise, and without giving such agencies a veto or giving them mandatory authority such as provided in section 30(c) of the Act.

The Committee recognizes that in certain cases the expert opinion and recommendations of these agencies may be that development of a site, even with license conditions, would not be consistent with fish and wildlife values and that a license should not issue. They are free to make such recommendations. They are not required to make favorable recommendations laced with conditions. If State or Federal fish and wildlife agencies report that a project's impacts, taken alone or in combination with others on a waterway planned or in existence, cannot be mitigated, FERC may have to conclude that issuance of the license, whether original or otherwise, may be inappropriate (at least in the form proposed) or power development. Further, fish and wildlife enhancement, not just protection and mitigation, must be part of the consideration at FERC. The goal is to avoid actions that would jeopardize this resource. In furtherance of this goal, fish and wildlife agencies might require conditions specifying adequate water flows annually or at special times, including, at times, low flows, for downstream fish migration, habitat protection, or to provide resting and feeding areas for wildlife, such as the whooping crane. In some cases, FERC may have to specify a flow regime which affects power output.

The Committee is aware of the concern over the Commission's authority to address license conditions and terms after licenses have been issued. In the Committee's view, this concern is largely based on possibilities, rather than actual history. The Committee believes that the Commission should have authority to ensure that licenses reflect current information concerning the need to protect fish and wildlife. The legislation does not change existing law, including case law, governing FERC authority to modify licenses during their term.

In addition, the Committee intends that conditions will be included in a preliminary permit only if such permit authorizes activities (studies, etc.) which may impact fish and wildlife.

The new subsection (j)(2) merely restates existing law concerning the application of the requirements of section 4(h)(11) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980 to any license, permit or exemption issued under the Federal Power Act for a project within the geographical area covered by the 1980 law. Nothing in the provision, or in H.R. 44, is intended to interpret or diminish the substantive and procedural obligations of the 1980 Act to such projects.

### SECTION 4.—RELICENSING PROCEDURES

Section 4 of the legislation amends section 15 of the Federal Power Act to establish new, competitive procedures applicable to all existing licensees and to persons competing for a new license after the expiration of an existing license. The new procedures are

intended to be applied in a manner that ensures public review and participation. It continues the present provisions of section 15(a), but makes clear that these provisions do not apply to original licenses. They apply only to existing licensees and their competitors.

The Committee also retained the authority for FERC to issue annual licenses to an existing licensee pending a resolution of the relicensing proceeding. However, the Committee expects FERC to use this authority in a manner that does not encourage or allow delay in the licensing proceeding. The Committee also notes that the Court in the *Yakima* litigation pointed out that such annual licenses can include fish and wildlife provisions. The court said:

> We also find unpersuasive FERC's argument that the procedure it used offers more protection for the fishery than simply issuing annual licenses. This argument is based on FERC's incorporation of the Mid-Columbia settlement agreement's minimum stream flow conditions into the new Rock Island license. The same protections could have been added to an annual license. An annual license must contain the same terms as the expired license, 16 U.S.C. 808(a), but the Rock Island license, as amended in 1974, contained a "reasonable modifications" clause in Article 21. The Mid-Columbia Proceeding interim settlement agreement could have been incorporated through that clause.

New section 15(a)(2) requires the Commission to award a new license to the applicant having the final proposal which the Commission "determines is best adapted to serve the public interest." Whether a project is "best adapted" is also dependent on the results of FERC's efforts under section 10(a) through (i) of the Act which are preferenced by the clause "All licenses issued under this Part," including section 15 licenses, "shall be on the following conditions . . . ." These conditions, when imposed, may spell the difference between approval or disapproval.

The Committee intends FERC to consider sections 10 and 15 together, but in saying that, we stress that for the applicant and FERC, relicensing is not to be the same as it is today. The scrutiny must be greater. Licenses issued in past years, must be reexamined and justified at relicensing in light of today's standards and concerns.

Recognizing that there may not be competing applications for many existing projects, the bill requires FERC to make this determination in every case, whether or not there are multiple applicants. The Committee intends all applicants to have knowledge of the standards under which their applications will be evaluated. Thus, in making the determination, FERC must consider a number of factors or criteria listed in the bill and, for each application, make the required findings as to each. These factors or criteria are included to guide the Commission's determination of which final proposal is best adapted. These factors or criteria are not intended to obviate the application of section 10(a) through (j) once a determination is made. Further, the criteria included in the legislation are intended to be applied in a fair and even manner and they are not to be considered by the Commission in a manner which would

BEST COPY AVAILABLE

unfairly skew the selection process in favor of one particular applicant over another.

The Committee stresses that relicensing is not to be a "rubber stamp," non-public process. The procedures and substance applicable to original licenses, including the treatment of non-developmental values, apply fully in relicensing. That process must ensure public review and participation. The process is subject to the purposes of section 4(e) as amended by this bill.

The specific factors or criteria to be considered by FERC are:

—the abilities of each applicant to comply with the requirements of the new license and the Federal Power Act, which may require the Commission to examine the resources, financial and personnel, an applicant has available to fulfill such requirements of the Act and the license;

—the management, operation and maintenance plans of the applicant for the project, including relevant safety factors;

—each applicant's need for power, including alternatives reasonably available to the applicant; in the case of an Indian tribe seeking a project located on the reservation, the tribe may include a statement for FERC consideration of the need for power to foster that tribe's purposes, including obtaining revenue to provide tribal services;

—the applicant's plans for the improvement and broad, efficient, and reliable utilization of the power potential of the waterway or waterways to which the project is related, together with other beneficial uses, including navigation, flood control, irrigation, recreation, water quality, and fish and wildlife;

—the existing and planned transmission services of each applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors;

—in the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant;

—the plans of each applicant to protect, mitigate damage to, and enhance, fish and wildlife resources (including related spawning grounds and habitat) and to protect and enhance recreational and other environmental values (including providing recreational access);

—the identity of any Federal or Indian lands included in the project boundary and a statement of the annual fees paid for such lands; plans of each applicant to adapt the project to any applicable State or Federal comprehensive plan (or plan issued pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980) for improving, developing, or conserving the waterway or waterways related to the project; and

—such other information as the Commission may require.

BEST COPY AVAILABLE

In applying these criteria, stable, efficient, reliable and low cost transmission systems are to be favored over costly, inefficient systems. Naturally, an applicant's efficient transmission system will weigh in that applicant's favor. In applying these criteria, the Committee intends, however, that the Commission not look with disfavor on applicants who do not have their own transmission systems.

The Commission should not consider whether or not an applicant's transmission system is connected to the project because this fact is irrelevant to determining the overall efficiency of the applicant's transmission system. Such consideration might unfairly benefit the existing licensee. For this reason, section 15(d)(1), as added by H.R. 44, prohibits this consideration from being taken into account in evaluating applications.

The Committee intends that energy conservation considerations apply equally to electric utilities, both municipal and private, as well as to non-utilities. However, in applying the provision to non-utilities, the Committee recognizes that paper mills and other non-utility licensees are not likely to have energy-consumption efficiency plans intended to assist their customers to conserve electricity. Rather, these companies should have, and the Commission should consider, plans to utilize electricity more efficiently at lower costs. The provision is not intended to preempt state law, and the Commission should not discount an application because the applicant is constrained under State law from engaging in certain energy conservation programs.

The Commission, relying on State and Federal fish and wildlife agencies, should examine, and where appropriate, compare plans to protect, mitigate damage to, and enhance, fish and wildlife for a single project to determine whether the proposal is, in fact, "best adapted" to promoting the public interest. This provision is in addition to, and does not modify, other requirements imposed on the Commission under this legislation or the provisions of other statutes.

The bill requires the Commission to consider the plans of the applicant to adapt the project to any applicable State or Federal comprehensive plan for a waterway, but this provision is not intended to modify any existing requirement of State or Federal law. Rather, it is intended to encourage applicants, who are not otherwise required to do so, to conform their plans to comprehensive State or Federal plans.

The new paragraph (3) of section 15(a) provides that the existing licensee's past record of compliance with the existing license terms and conditions and the actions affecting the public which were taken by such licensee relating to the project shall also be taken into consideration by FERC. The positive and negative history of the licensee will be considered.

The bill adds subsections (b) and (c) to section 15 of the Federal Power Act to establish timetables and procedures to be utilized by the Commission in section 15 proceedings. The amendments require applications to be submitted at least 24 months prior to the expiration of the existing license and that they be comprehensive and publicly available, particularly to fish and wildlife agencies. The requirement for reimbursement of reproduction costs is not intended to apply to the fish and wildlife agencies because of their

BEST COPY AVAILABLE

important statutory role under the Fish and Wildlife Coordination Act and the procedural requirements of this legislation. FERC must arrange that such agencies promptly receive all necessary and pertinent information on a current and timely basis.

The bill specifies that an existing licensee must file with FERC at least 5 years prior to the expiration of the existing license notice of its intentions regarding a new license. Once filed, FERC must give public notice of the licensee's intentions, and notify the fish and wildlife agencies.

The Committee, in recognition of the applications pending or about to be filed, has provided FERC authority for reasonable adjustments of these filing deadlines consistent with the objectives of these deadlines. Failure to meet the deadlines must prejudice the affected entity. FERC has no authority in the bill to waive the deadlines or to find reasons for granting exceptions, grace periods, or otherwise recognizing excuses.

The bill requires the Commission to establish a deadline for submission of final amendments, if any, to applications. The Committee does not intend the final amendment deadline to restrict the Commission's ability to shape a license which will assure the best possible project. It is expected that applicants will submit an initial application to be followed by a brief period of review with the Commission, the fish and wildlife agencies, and others to discuss problems and inadequacies. The Commission can then allow the applicant a brief time to amend the application to resolve these matters. Once the final amendments are filed, the applicant is bound by them. Further amendments are not permitted, although the FERC public proceedings will be supplemental. All of this will be done in accordance with FERC deadlines designed to keep the process moving without undue delay and consistent with all of the law's requirements, particularly section 4(e).

It is expected that the Commission will select a licensee based on these proposals but that once a licensee is selected, changes may be made by the Commission in preparing the license consistent with the provisions of section 10 of the Act.

New subsection (d)(1) directs FERC, considering applications for relicensing, not to consider access to transmission facilities. The Committee does not want FERC to disapprove an application because of a lack of direct access. Indeed, the Committee added paragraph (2) to deal with that problem when, and if, it occurs. The Committee believes that in most relicensing cases where there is a challenge, transmission access and other services will not be a problem. But if it occurs, paragraph (2) provides a means to resolve it.

Paragraph (2) provides that when a license is issued to a new licensee (other than the existing licensee) and FERC finds that the new licensee cannot enjoy the benefits of such success, FERC must notify both parties of its finding and direct them to start negotiations for the needed services, including transmission services, and the payment of costs related to the services. It is intended that FERC would only make such a finding at the initiation of the new licensee.

The bill emphasizes a Congressional intent that these matters be negotiated by the parties and that negotiations be carried out in

BEST COPY AVAILABLE

good faith. Of course, any agreement reached must be approved by FERC to ensure that it is consistent with the Federal Power Act as amended by this bill and to be made a part of the license and enforced by FERC against both parties. FERC will set the time for negotiations.

The provision allows a new licensee to obtain reasonable services from the existing licensee that are necessary to permit the new licensee to utilize the power from the project. This would include transmission and other services for which the new licensee would pay the costs demonstrated by the existing licensee as being related to the services. It is intended that these costs would include transaction costs, as well as the percentage of fixed costs associated with the provision of such services. Unrelated costs are not to be included.

If the negotiations do not result in an agreement between the new and existing licensee, the Commission is required to order the existing licensee to file a tariff, pursuant to section 205 of the Act, to ensure such services will be available at the necessary time. The Commission, after notice and public hearing, shall establish by order rates for the services considering the standards applicable to the negotiations, but not inconsistent with section 205 of the Act. In short, FERC can adopt the tariff or change it and specify reasonable terms and conditions.

The paragraph stresses that any negotiated agreement order is to "ensure the access necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the new license" and Part I of the Act. But this is not a blank check. There are exceptions to this requirement. They are that FERC shall not:

—compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing serivce to customers) of the new licensee identified as of the date one day preceding the date of license award or require the construction of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities necessary to carry out the purposes of this provision;

—adversely affect the continuity and reliability of service to the customers of the existing licensee;

—adversely affect the operational integrity of the transmission and electric systems of the existing licensee; and

—cause an increase (other than a possible de minimus increase) in the jurisdictional rates of the existing licensee.

The subsection restricts the Commission from ordering services which would require the existing licensee to upgrade existing facilities other than through reasonable enhancement or improvement of existing facilities. It is the Committee's understanding that such enhancement or improvement would not, for example, include restringing an existing line with larger conductors to convey the line to a significantly higher voltage, such as 44 kilovolts to 110 kilovolts, but would include capacitors that are installed to upgrade the power factor. Existing licensees are to be reimbursed for such enhancement or improvement.

BEST COPY AVAILABLE

The conditions contained in section 15(d)(2)(A-D) concerning Commission orders are intended to provide reasonable assurances that Commission orders will not be substantially adverse to the existing licensee's operations and Commission-regulated rates, while also assuring that the purposes of the subsection are fully implemented and workable. No parallel meaning or interpretation, however, is intended between these provisions and the provisions of section 211 and 212 of the Federal Power Act. They are separate and distinct.

The Committee is aware that transmission services may not be technically feasible in every case. While the Committee believes that transmission will be feasible in most cases, the term "services" is used in recognition of the possibility that services other than transmission may be appropriate to achieve the purposes of the bill

The subsection also provides that any FERC order, including an order adopting any negotiated agreement, shall be for such period as the Commission deems appropriate, not to exceed the term of the license. An order could be for a period far less than the license term to ensure that it works as intended and could then be renewed with such changes, if any, as may be needed. The changes would be made in the same way as the original order. At any time, the Commission upon its own motion or upon a petition by the existing or new licensee and after notice and opportunity for a public hearing, may modify, extend, or teminate such order.

The Committee stresses that the purpose of this subsection is to complement the relicensing process and ensure an opportunity for competition. We do not want competition, as limited as it may be, or the statutory mandate of "best adapted to serve the public interest" to be thwarted for what might be discribed as "technical" reasons.

New subsection (e) of section 15 provides the Commission with discretionary authority to award the existing licensee reasonable compensation in addition to that requried by subsection (a)(1) of section 15 in the event the license is transferred. All compensation under section 15 may be in money or electric power, or both, as the Commission determines.

Any additional compensation under subsection (e) shall be based on a Commission determination considering the following: that the existing licensee does not have a legal right to compensation for the expiring license; that the extent to which it has amortized the project; and, finally, the cost to the new licensee of duplicating the facility, considering the remaining useful life of the project.

Compensation under subsection (e) is to be determined pursuant to regulations issued by the Commission within 180 days after enactment. License awards should not be delayed by the Commission pending issuance of these regulations. The regulations are guidance to FERC and the applicants. They may provide such compensation as FERC finds appropriate "toward the mitigation of any demonstrated economic loss to customers of the existing licensee." The bill intends that the regulations will ensure that compensation does not discourage competition or provide a windfall for the current ratepayers of the existing licensee or for either the existing or new licensee.

BEST COPY AVAILABLE

SECTION 5.—COMMISSION AUTHORITY

Section 5 adds new section 31 to the Federal Power Act that provides the Commission with additional enforcement authority to ensure that license, exemption or permit conditions are met. The amendments are not intended to reduce, restrict, or limit the authority of the Commission under other provisions of the Act. It supplements that authority, including section 309 of the Federal Power Act. However, FERC should not view these comments as Committee endorsement of FERC enforcement efforts, the remedies followed by FERC, or the FERC enforcement process. As noted earlier in this report, the Ovesight and Investigations Subcommittee initiated an investigation beginning last fall into FERC enforcement. That investigation is continuing.

During the Subcommittee hearings, Mr. Horn testified (Hearing, *supra,* pp. 90, 95–96):

> *At the present time, numerous hydroelectric stations throughout the country, particulary in the Northeast, are being operated without licenses or exemptions from licensing.* Many of these operations are adversely affecting the fulfillment of state and/or federal objectives related to resource enhancement which are embodied as conditions attached to newly-licensed, exempted, or relicensed developments within the same basin. For example, provisions for adequate minimum downstream releases, minimum turbine mortality to fish, construction and operation of upstream and downstream fish passage facilities, water quality, public safety and recreational access to project lands and waters are essential to the completion of ongoing natural resource programs designed to protect and enhance indigenous fishery resources and to permit the reestablishment of historic anadromous fisheries. As such, without the inclusion of all unlicensed and grandfathered hydropower projects in the regulatory process, the opportunity to fulfill desired management objectives could be significanlty compromised.
>
> * * * * *
>
> *FERC currently has a very limited enforcement staff with wide-ranging responsibilities. Their tendency is to concentrate on large projects, particularly during construction and to respond to complaints rather than aggressively monitor compliance with the terms and conditions attached to a license or exemption.* At the present time, state and federal resource agencies do not have the staffs or resources to conduct a full-time surveillance program for the currently licensed and exempted hydroelectric facilities to ensure that they are being operated in compliance with the terms and conditions attached to a license/exemption. In the case of exemptions, the entire burden of monitoring falls to the state. *Lack of compliance is of particular concern in many states.* The addition of terms and conditions for those projects that will be subject to relicensing or li-

BEST COPY AVAILABLE

censing in the next few years will only serve to increase the current workload.

*Therefore, the FERC should be directed by Congress to upgrade its current monitoring and compliance program, in cooperation with the states, to ensure full compliance with the conditions established in a license or an exemption.* Further, FERC should work with the states to assure that the procedures and timetables for the monitoring of projects and the processing of violations are clearly understood by all parties including the public. If states are to actively assist in this enforcement role, then adequate funding should be provided.

For many facilities, inadequate information is being gathered to ensure compliance with license or exemption conditions. For example, many licenses or exemptions require maintenance of minimum reservoir levels and/or downstream flows while others specify a run-of-river mode of operation; *however, there are no standardized monitoring procedures for these conditions.* Perhaps all facilities might be required to install electronic monitoring devices that will provide continuous records of the reservoir levels and flows and the concurrent mode of operation. These records would then be submitted periodically to FERC and the appropriate state and federal resource agencies.

Finally, non-compliance by a developer should be subject to severe penalty including revocation of a license or an exemption from licensing for persistent violators. [Italic supplied.]

These concerns, plus the Subcommittee's investigations in the 98th Congress and those of the Subcommittee on Oversight and Investigations of this Committee, indicate that FERC enforcement efforts need buttressing and improvement. That is the purpose of this section.

Subsection (a) requires that FERC monitor and investigate compliance, not just with regard to large projects or these under construction. All projects, including those exempted from licensing, must be watched to ensure compliance. The Committee also expects FERC to locate projects that are being operated without legal authority and to enforce the law. The Committee expects FERC to report to the Committee within six months about this alleged problem. The subsection authorizes FERC to issue, after notice and an opportunity for public hearing, orders, subject to judicial review, to require compliance with license, permit, and exemption terms and conditions. FERC's informal approach to enforcement is of concern and is being questioned by the Subcommittee on Oversight and Investigations.

Subsection (c) provides a new enforcement tool in the form of civil penalties for failure or refusal to comply with a subsection (a) order or any matter referenced in subsection (a) or for violations of such matters or orders. These penalties will be assessed by FERC only after notice and opportunity for hearing. Provision is made for reasonable compromise where warranted. Enforcement of such penalties will be in the Federal district court.

BEST COPY AVAILABLE

Finally, subsection (b) authorizes FERC to revoke a permit, license, or exemption where FERC, after notice and opportunity for an evidentiary hearing, finds that the licensee, permittee, or exemptee "knowingly" violated a subsection (a) order which has been reviewed judicially or, at least that opportunity was provided and not utilized within the prescribed time under the Act, and such person was given time to comply with the subsection (a) order prior to initiation of revocation. In that proceeding, such order is subject to *de novo* review. FERC is directed not to revoke until the Commission "has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation."

The section provides adequate safeguards. In the case of revocation, the Committee thinks the authority and its threat is needed, but we expect it to be used quite sparingly.

SECTION 6.—AMENDMENTS CONCERNING CONDUITS AND CERTAIN SMALL POWER PRODUCTION FACILITIES SUBJECT TO PURPA BENEFITS

Section 6 of H.R. 44 amends the Federal Power Act to correct a regulatory gap that exists in the environmental review process for exempted projects, to increase the size of certain projects eligible for exemption under the Federal Power Act, and to address the problem of increasing numbers of new dam or diversion hydro projects.

*National Marine Fisheries Service*

Section 6(a) of H.R. 44 amends section 30(c) of the Federal Power Act to provide the same authority to the National Marine Fisheries Service (NMFS) as is currently provided to the United States Fish and Wildlife Service (*i.e.* to establish conditions for certain projects exempted from licensing). It is a technical amendment. The current section 30(c) was enacted in 1978 and requires the Commission in making an exemption, to "consult with the United States Fish and Wildlife Service and the State agency exercising administration over the fish and wildlife resources of the State in which the facility is or will be located, in the manner provided by the Fish and Wildlife Coordination Act." The provision also permits those agencies to set terms and conditions to be included by the Commission as part of any granted exemption "to prevent loss of, or damage to, such resources and to otherwise carry out the purposes of such Act." The Commission has an obligation to enforce those terms and conditions and the Committee expects that the Commission will do so.

For several years, the Commission interpreted the reference to the U.S. Fish and Wildlife Service in section 30(c) to include NMFS. However, in July, 1983, the Commission changed its interpretation, and decided that NMFS had no authority under section 30(c) to set terms and conditions. In the 98th Congress, the Commission disagreed with the Commission's interpretation which, incidentally, helped fuel the concern of environmentalists and others that power development is favored over non-power uses of our waterways. As a result of this concern, the Committee adopted this provision as part of S. 1132 (see H.R. Rept. 98-1052, pp. 5-7). How-

BEST COPY AVAILABLE

ever, as noted earlier, S. 1132 failed at the end of the 98th Congress to obtain passage for other reasons. Later the U.S. Court of Appeals for the Ninth Circuit ruled in favor of FERC's interpretation without apparently being aware of the Committee's comments.

H.R. 44, as amended, corrects what this Committee believes is an oversight, to make clear that the NMFS has the same authority to set binding terms and conditions for exemptions to prevent loss of, or damage to, marine and anadromous fishery resources as the Fish and Wildlife Service. When section 30(c) was adopted in 1978, the Committee believed then and now that, in light of long history, the reference to the Fish and Wildlife Service in the Coordination Act included NMFS which is the successor to the old Bureau of Commercial Fisheries established in 1956 under the Fish and Wildlife Service. The amendment corrects any misunderstanding of the statute, puts the two Federal fishery agencies on a par under the Fish and Wildlife Coordination Act and closes the technical regulatory gap where marine and commercial fisheries are involved.

*Municipally Owned Conduit Hydroelectric Projects*

Section 6(b) of the legislation modifies section 30(b) of the Federal Power Act to permit certain hydroelectric conduit facilities constructed, operated and maintained by a State or municipal government (or agency thereof) solely for water supply for municipal purposes to be eligible for an exemption from the Part 1 licensing requirements. All other requirements of section 30 would apply to such a project.

*Qualifying Facility Status for Projects Involving New Dams or Diversions*

Section 6(c) and 6(d) amend sections 3(17) and 30 of the Federal Power Act. In 1978, the Public Utility Regulatory Policies Act was enacted to stimulate and facilitate the development of alternative domestic energy supplies. Section 210 of PURPA requires electric utilities to sell electricity to, and purchase electricity from, qualifying cogenertion facilities and qualifying small power production facilities. Congress realized that there were numerous existing dams that could be rebuilt to provide power sources. Congress wanted to encourage that use in an environmentally sound manner and to help foster competition for electric utilities. For existing dams, we think it is still a sound program.

The Commission has interpreted the statutory definition of a small power production facility to include small hydro projects utilizing new dams or diversions. Combined with tax incentives under other provisions of law and the exclusion from the requirements of the Securities Exchange Commission available for these projects, the benefits under section 210 of PURPA have contributed to what is often described as an explosion in the number of proposed and actual new dam or diversion projects.

The Committee does not share the Commission's interpretation of the definition of a small power production facility. However, the Committee believes that the factual record concerning the impact of extending these benefits to new dam or diversion projects has not been fully developed. Therefore, the Committee believes that legislation to exclude these projects from the benefits of PURPA or

BEST COPY AVAILABLE

other provisions of law is premature, taking into consideration the possibility that some may be sound environmentally and offer energy benefits.

The Committee believes that the record, including the need for power from these projects, should be more adequately developed. The legislation therefore directs the Commission to prepare a study (akin to a NEPA study and in accordance with that law) and report to the Congress whether PURPA and other benefits should be available to small new dam or diversion projects. In performing the study, the Commission is required by section 6(h) of the legislation to consider the following: whether the power from such projects is needed; the environmental impacts of new dams or diversions alone and in combination with other existing or proposed projects on the same waterway; the impact on electric rates of section 210 of PURPA; and the intent of Congress in 1978 to limit section 210 PURPA benefits to existing dams. The legislation directs that the Commission initiate the study within three months after the date of enactment of H.R. 44.

In order to preserve the *status quo,* the legislation directs the Commission to cease accepting applications for preliminary permits for new dam or diversion projects as applications for preliminary permits for new dam or diversion projects as of December 31, 1985 and to suspend the effect of any permits issued before that date (or applied for but not issued as of that date) during the pendency of the study and for 180 consecutive legislative days after the report has been submitted to the Congress. The suspension of preliminary permits shall not apply to any project for which the required environmental consultation was initiated before the date of enactment of this legislation.

The Committee believes that this study will provide the factual basis for determining whether PURPA benefits should continue to be extended to new dam or diversion projects or be eliminated entirely. However, the Committee believes that the record concerning the known enviromental problems caused by new dam or diversion projects justifies caution. It is the view of the Committee that in return for receiving PURPA and other benefits, these new dam and diversion projects should be subject to addtional environmental safeguards beyond those required for existing facilities.

The legislation creates two new requirements for small new dam or diversion hydro projects to be eligible for these benefits. First, the license or exemption for such project must include conditions to protect, mitigate damage to, and enhance, fish and wildlife in the same manner as is currently applicable to exempted conduit hydro electric projects under section 30(c) of the Federal Power Act. Taking these conditions into account along with the effects of the project alone and in combination with all other facilities on the same watercourse or relevant related waterways, the Commission must determine that the project will not have substantial adverse effects on the environment, including recreation or water quality. This requirement for cumulative impact analysis is intended to prevent PURPA benefits from being extended to new dam or diversion projects which substantially alter, even with mitigation, existing habitat, recreational uses or water quality.

BEST COPY AVAILABLE

Second, the Commission must determine that the project is not located on any segment of a waterway that is included or designated by law for potential inclusion in a State or national wild and scenic river system or which the State has determined, under State law, to possess unique natural, recreational, cultural or scenic attributes. The Committee does not intend that the Commission will have independent authority to review whether the waterway possesses such attributes.

These new conditions for the receipt of PURPA benefits do not address whether incentives under PURPA and other provisions of law should be available based on an actual need for the power produced by the project. This question arises most clearly in the Pacific Northwest where a surplus of energy now exists and where the abundance of waterways makes hydro development possible. The Commission has received thousands of applications for preliminary permits for proposed projects involving new dams and diversions and has issued permits on many of the streams, creeks, and rivers in the Columbia basin and elsewhere in the Northwest. Many of these projects are reportedly being proposed and built on blue ribbon trout streams and tributaries that affect anadromous fish runs and hatcheries.

This issue is of major importance to the Pacific Northwest and that efforts to restore and enhance fisheries could be affected by such continued development. Cooperation between the Commission and the region's planners and the regulators should result in only needed development.

In recognition of the fact that some developers have relied on the provisions of the Federal Power Act and PURPA and have committed substantial amounts of money to their projects, special provisions are included in the legislation to exempt these developers from some or all of the additional environmental reviews for PURPA inspired new dam or diversion projects. Under these provisions, a project for which a license or exemption application has been filed and accepted by the Commission, as of the date of enactment of this Act, will not, through the effective date provisions, be subject to either of the additional requirements described above. The new Section 10(j), however, will apply to those projects.

Projects for which a license or exemption application have not been accepted, but for which environmental consultations have been initiated pursuant to the Commission's regulations in effect as of December 31, 1985, shall be exempt only from section 30(c)(2) concerning waterways included in a wild or scenic river system or designated by the State as having certain unique attributes. The Committee intends that the initiation of environmental consultations under the regulations be more than mere correspondence between the developer and any agency, but, rather, that it include the performance of studies, analyses, or other significant efforts evidencing detrimental reliance on the provisions of existing law.

The Committee is aware that certain projects may involve the construction of a new dam at the site of an existing dam and impoundment. Reportedly, the principal reason for such new construction involve improving dam safety, increasing power output, and protecting fish and wildlife. For example, construction of a new dam at the site of an existing dam is reportedly necessary at

BEST COPY AVAILABLE

the Felts Mill project in Jefferson County, New York, to improve the spawning capabilities of the walleye fish. The construction is said to be behind the existing dam and within the area of the existing impoundment (without modifying the impoundment except in a minimal fashion). It is also supposed to meet all federal and state environmental, recreational and other requirements. In such limited cases, such new construction possibly should be treated as reconstruction of an existing dam. We expect FERC to examine the issue carefully and fairly.

*Unauthorized Construction*

Section 6 of the legislation also includes an amendment to section 30 of the Federal Power Act to prohibit construction activities at any Commission licensed or exempted project unless such activities are in accordance with the terms or conditions of the license or exemption.

*Fee Authority*

The legislation also amends section 30 of the Federal Power Act to provide the Commission with new authority to impose fees on projects exempted from licensing or on new dam or diversion small hydro projects to reimburse the National Marine Fisheries Service, the United States Fish and Wildlife Service, and relevant state fish and wildlife agencies for the reasonable costs of studies or other activities by these agencies under section 30 of the Federal Power Act, as amended by this legislation. This amendment is in addition to any fee requirement of section 10(e).

SECTION 7.—EFFECTIVE DATE

Except as provided in other sections of the bill, the requirements of H.R. 44 shall take effect with respect to each permit, license or exemption issued after the date of enactment. The amendments made by section 5 of the bill apply to all licenses, exemptions and permits without regard to when issued.

SECTION 8.—COMPLIANCE WITH BUDGET ACT

This section provides that any provision of the bill which directly or indirectly, authorizes the enactment of new budget authority shall be effective only for fiscal years beginning after September 30, 1986.

SECTION 9.—PROVISION OF INFORMATION TO CONGRESS

The section requires the Commission to fully and currently inform the Committees of Congress which exercise legislative jurisdiction over the Federal Power Act of all actions taken by the Commission with the respect to Part 1 of the Federal Power Act. This is a restatement of a similar requirement under the Department of Energy Reorganization Act that also applies to FERC. But it is too often observed in the breach.

BEST COPY AVAILABLE

SECTION 10.—ELECTION AND NEGOTIATIONS CONCERNING OTHER CONTESTED PROJECTS SUBJECT TO LITIGATION

A number of proceedings under section 15 of the Federal Power Act involve competition for a new license between the incumbent licensee and a municipal challenger. The Committee believes that challenges filed prior to October, 1983, the date of the Commission's initial decision in the *Merwin* case, raise unique equitable concerns that should be addressed by the legislation. As a general rule, the Committee opposes retroactively divesting parties of rights acquired under law or frustrating legitimate expectations based on existing provision of law.

In October, 1983, the Commission decided that the municipal preference applicable under section 7 did not apply in proceedings under section 15. As already noted, this decision reversed a 1980 decision in which the Commission ruled that the preference for municipalities did apply in section 15 proceedings. The Commission's 1980 decision in the *Bountiful* case was affirmed by the United States Court of Appeals for the Eleventh Circuit. The Supreme court refused all petitions for *certiorari* in the *Bountiful* case.

The municipal challengers in the nine cases to which this section of H.R. 44 applies filed or continued their applications at the Commission after the 1980 decision and before its reversal in 1983. The Commission has not taken any action in these cases pending a determination of the preference issue. Basic factual inquiries to determine the adequacy and merits of each applicant's plan have not been made.

As a result, the Committee believes that it would be inequitable to apply the provisions of H.R. 44 to these cases in the absence of the agreement of the parties. On the other hand, the Committee also believes that H.R. 44 reflects sound public policy.

Rather than impose the provisions of H.R. 44 on these cases, or force the parties to continue under current law, the Committee has established a process under which the voluntary choices of the parties will determine the provisions of law that apply. If the new law is applied, the municipal challenger will be permitted to withdraw its application and receive compensation from the existing licensee.

Under this section, if the existing licensee fails to elect within 90 days of the date of enactment of H.R. 44 to negotiate with the challenging municipality, the provisions of law in effect one day prior to the enactment of H.R. 44, as ultimately decided in the *Merwin* litigation, (and sections 3, 5 and 6(f) of H.R. 44) shall apply to the proceeding. If the existing licensee chooses to negotiate, the competing municipality will have 45 days from the date it receives notice of the election by the existing licensee, to accept the election, withdraw its application for a new license, and enter into negotiations. If the municipal challenger refuses to accept the election, the provisions of H.R. 44, as enacted, shall apply. The parties, not Congress, have full opportunity of choice based on what is best for them. We believe that fair and reasonable.

If both parties elect to negotiate, they shall commence negotiations for compensation in money or power (or both) to be provided to the municipality for the withdrawal of its application. The com-

pensation shall include the costs incurred by the municipality prior to December 31, 1985, in filing and maintaining its application, litigation and associated costs arising prior to that date related to the proceeding, costs arising at any point from the litigation concerning the applicability of preference to these cases, and an additional sum representing a reasonable percentage of the net investment of the existing licensee in the project as of October 22, 1985. Pacific Gas & Electric Company, which is involved in four of the nine cases affected by this provision, has provided the Subcommittee on Energy Conservation and Power with a letter detailing the net investment of PG&E in these projects. The Committee developed this provision based on an awareness of these figures. The Committee intends that costs related to this legislation not be reimbursed.

If the negotiations fail to result in an agreement for compensation within the time period established by the Commission, then the responsibility for establishing compensation shall rest with the Commission. In issuing an order for compensation, the Commission is limited by the conditions established by this provision for negotiations between the parties. Compensation shall be determined by the Commission considering any stipulations agreed to by the parties that are accepted by FERC and the following four factors:

(1) The quality of the proposals of the existing licensee and the competing applicant. This consideration is not intended by the Committee to require a detailed comparison of analysis of proposals similar to that which would occur in the licensing process.

(2) The net benefits to both parties and their customers of obtaining the new license. The Committee intends this consideration to require the Commission to analyze what benefit the competing applicant (and its customers) is foregoing and what benefit will flow to the existing licensee (and its customers) by the withdrawal of the challenger's application.

(3) The extent to which applications were actively pursued and filed in good faith. The Committee intends that, in determining the appropriate compensation, the Commission will consider whether each party made diligent and serious efforts to obtain a new license. In assesssing the efforts made by each party, the Commission shall not penalize either party for delays caused by the Commission's own actions.

(4) The extent of reliance by each of the parties on the provisions of law in effect prior to the enactment of H.R. 44 and the impact of this reliance on the applicant's operations and service area. It would be appropriate for the Commission to consider any foregone opportunities or plans resulting from continuance of the application.

The section requires that the negotiated agreement or the FERC imposed order will be reflected in the license for the project and enforceable by FERC and, if course, must be consistent with the Federal Power Act. If the parties agree, they will establish by agreement the method, period, and manner of compensation. If FERC has to decide, the bill provides that FERC will decide the method, period, and manner of payment. All of these matters are to be carried out without delay.

BEST COPY AVAILABLE

SECTION 11.—CHARGES FOR USE OF DAMS AND STRUCTURES

This section amends section 10(e) of the Federal Power Act to establish statutory ceilings on the amount of charges assessed under the subsection for licenses involving the use of Government dams or other structures owned by the United States. The ceilings reflect the charges established by the Commission in its final rule issued May 23, 1984. The section is applicable for all licenses issued after the date of enactment of H.R. 44 and for licenses issued before such date which did not previously fix a charge and did not specify that no charge would be fixed. The Commission is required, every five years, to review the appropriateness of the charge limitations and to report to Congress any recommendations based on its review. The provision is identical to the S. 1132 provision in the 98th Congress.

SECTION 12.—MERWIN PROJECT GRANDFATHER

Section 12 of the bill provides that the amendments made by H.R. 44 shall not apply to the Federal Energy Regulatory Commission proceeding invovling FERC Project No. 935 (FERC Project No. 2792) relating to the Merwin Dam in Washington State. This provision is intended to exempt the proceedings for the Merwin Dam Hydroelectric Project involving the Clark/Cowlitz Joint Operating Agency and the Pacific Power and Light Company from the provisions of this legislation, except for the amendments made by section 5 and (6)(f). Both CCJOA and PP&L requested the Committee to include this provision.

In view of the advanced state of the Merwin proceeding and in fairness to the legitimate expectations of the competing applicants, all proceedings related to this case should continue to be governed by the provisions of current law as interpreted in judicial decisions, including any proceedings following remand by the courts to the Commission, (e.g. proceedings necessary to establish license transfer compensation) until the competition for the Merwin license is finally resolved. The Committee encourages expeditious future proceedings in this case, and believes that the delay occasioned pending resolution of this controversy should not work to deprive the eventual new licensee for the Merwin project of a full license term.

It is the understanding of the Committee that the parties have both agreed to make substantial fish and wildlife improvements pursuant to agreement with the State. For this reason, we did *not* require the license applicants to comply in this proceeding to the new fish and wildlife provisions of the bill. We expect FERC to ensure that the new licensee comply fully with those commitments and advise us of any failures or delays in this regard.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

BEST COPY AVAILABLE

FEDERAL POWER ACT

* * * * * * *

SEC. 3. The words defined in this section shall have the following meanings for purpose of this Act, to wit:

(1) * * *

* * * * * * *

(17)(A) * * *

* * * * * * *

(C) "qualifying small power production facility" means a small power production facility—

(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities; and

*(iii) which complies with the applicable provisions of section 30(e) of this Act in the case of a hydroelectric generating facility involving the impoundment or diversion of the water of a natural watercourse by means of a new dam or diversion;*

* * * * * * *

*(E) "new" when used with respect to a dam or diversion refers to a dam or diversion which—*

*(i) is used in connection with any small power production facility; and*

*(ii) requires any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices);*

* * * * * * *

SEC. 4. The Commission is hereby authorized and empowered—

(a) * * *

* * * * * * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will

BEST COPY AVAILABLE

not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.[2] *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. *In issuing any license under this Part for any project, the Commission shall give equitable treatment with the development purposes for which the license is issued to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.*

* * * * * * *

SEC. 7. (a) In issuing preliminary permits hereunder or *original* licenses where no preliminary permit has been issued [and in issuing licenses to new licensees under section 15 hereof], the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

* * * * * * *

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or develop-

BEST COPY AVAILABLE

ing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational [purposes; and] *and other purposes referred to in section 4(e)* if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * * * * * *

(e) *(1)* That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided,* That when licenses are issued in involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further,* That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charges, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

*(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or*

BEST COPY AVAILABLE

*readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces, 1½ mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours. Except as provided in subsection (f), such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.*

*(3) The provisions of paragraph (2) shall apply with respect to—*

*(A) all licenses issued after the date of the enactment of this paragraph; and*

*(B) all licenses issued before such date which—*

*(i) did not fix a specific charge for the use of the Government dam or structure involved; and*

*(ii) did not specify that no charge would be fixed for the use of such dam or structure.*

*(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations provided for in this subsection and report to Congress concerning its recommendations thereon.*

* * * * * * *

*(j)(1) That in order to adequately protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which the license is issued, each license, exemption, or permit issued under this Part shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (3) and section 30, such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.*

*(2) The requirements of section 4(h)(11) of the Pacific Northwest Electric Power Planning and Conservation Act shall apply as provided in that Act to any license, exemption, or permit issued under this part for a project within the area subject to that Act.*

*(3) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this Part or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recomendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):*

*(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this Part or with other provisions of law applicable to the project.*

*(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).*

BEST COPY AVAILABLE

*Subsection (i) shall not apply to the conditions required under this subsection.*

* * * * * * *

SEC. 14. (a) * * *

(b) [No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 15.] In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if it does not itself recommend such action pursuant to the provisions of section 7(c) of this part, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 15(a), for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

SEC. 15. (a)*(1)* That if the United States does not, at the expiration of the [original] *existing* license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the Commission is authorized to issue a new license to the [original] *existing* licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the [original] *existing* license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in Section 14 hereof: *Provided,* That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the [original] *existing* licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the [original] *existing* license until the property is taken over or a new license is issued as aforesaid.

*(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest. In making this determination under this section (whether or not more than one application is submitted for the project), the Commission shall consider and make findings respecting each of the following:*

*(A) The abilities of each applicant to comply with (i) the articles, terms, and conditions of any license issued to it as a result of the application and (ii) other applicable provisions of this Part.*

BEST COPY AVAILABLE

*(B) The plans of each applicant to manage, operate, and maintain the project safely, and in accordance with this Act and the terms and conditions of the license.*

*(C) The need of each applicant for the electric power generated by the project or projects. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the needed of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.*

*(D) The plans of each applicant for the improvement and broad, efficient, and reliable utilization of the power potential of the waterway or waterways to which the project is related, together with other beneficial uses, including navigation, flood control, irrigation, recreation, water quality, and fish and wildlife.*

*(E) The existing and planned transmission services of each applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.*

*(F) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.*

*(G) The plans of each applicant to protect, mitigate damage to, and enhance fish and wildlife resources (including related spawning grounds and habitat) and to protect and enhance recreational and other environmental values (including providing recreational access).*

*(H) The identity of any Federal or Indian lands included in the project boundary ard a statement of the annual fees paid for such lands.*

*(I) Plans of each applicant to adapt the project to any applicable State or Federal comprehensive plan (or plan issued pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980) for improving, developing, or conserving the waterway or waterways related to the project.*

*(J) Such other information as the Commission may require.*

*(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:*

*(A) The existing licensee's record of compliance with the terms and conditions of the existing license.*

*(B) The actions taken by the existing licensee related to the project which affect the public.*

*(b)(1) Each existing licensee shall notify the Commission whether the licensee intends to file an application for a new license or not. Such notice shall be submitted at least 5 years before the expiration of the existing license.*

*(2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably available to*

BEST COPY AVAILABLE

*the public for inspection at the offices of such licensee: current maps, drawings, data, and other information that the Commission shall, by rule, require regarding the construction and operation of the licensed project. Such information shall include, to the greatest extent practicable, pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at reasonable costs of reproduction. Within 180 days after the enactment of the Electric Consumers Protection Act of 1985, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.*

*(3) Promptly follwing receipt of notice under paragraph (1), the Commission shall provide public notice of whether an existing licensee intends to file or not to file an application for a new license. The Commission shall also promptly notify the National Marine Fisheries Service and the United States Fish and Wildlife Service, and the appropriate State fish and wildlife agencies.*

*(c)(1) Each application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license. Each applicant shall consult with the fish and wildlife agencies referred to in subsection (b) and, as appropriate, conduct studies with such agencies. Within 60 days after the statutory deadline for the submission of applications, the Commission shall issue a notice establishing expeditious procedures for relicensing and a deadline for submission of final amendments, if any, to the application.*

*(2) The time periods specified in this subsection and in subsection (b) shall be adjusted, in a manner to achieve the objectives of this section, by the Commission by rule or order with respect to existing licensees who, by reason of the expiration dates of their licenses, are unable to comply with a specified time period.*

*(d)(1) In evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has, or has access to, adequate transmission facilities.*

*(2) When the Commission issues a new license (pursuant to this section) to an applicant which is not the existing licensee of the project and finds that it is not feasible for the new licensee to utilize the energy from such project without provision by the existing licensee of reasonable services, including transmission services, the Commission shall give notice to the existing licensee and the new licensee to immediately enter into negotiations for such services and the costs demonstrated by the existing licensee as being related to the provision of such services. It is the intent of the Congress that such negotiations be carried out in good faith and that a timely agreement be reached between the parties in order to facilitate the transfer of the license by the date established when the Commission issued the new license. If such parties do not notify the Commission that within the time established by the Commisson in such notice (and if appropriate, in the judgment of the Commission, one 45-day extension thereof), a mutually satisfactory arrangement for such services that is consistent with the provisions of this Act has been executed, the Commission shall order the existing licensee to file (pursuant to section 205 of this Act) with the Commission a tariff, subject to refund, ensuring such services beginning on the date of*

BEST COPY AVAILABLE

*transfer of the project and including just and reasonable rates and reasonable terms and conditions. After notice and opportunity for a hearing, the Commission shall issue a final order adopting or modifying such tariff for such services at just and reasonable rates in accordance with section 205 of this Act and in accordance with reasonable terms and conditions. The Commission, in issuing such order, shall ensure the access necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the license and this Part, except that in issuing such order the Commission:*

*(A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the construction of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities necessary to carry out the purposes of this paragraph;*

*(B) shall not adversely affect the continuity and reliability of service to the customers of the existing licensee;*

*(C) shall not adversely affect the operational integrity of the transmission and electric systems of the existing licensee; and*

*(D) shall not cause an increase (other than a possible de minimus increase) in the jurisdictional rates of the existing licensee. Such order shall be for such period as the Commission deems appropriate, not to exceed the term of the license. At any time, the Commission, upon its own motion or upon a petition by the existing or new licensee and after notice and opportunity for a hearing, may modify, extend, or terminate such order.*

*(e)(1) When a license is issued pursuant to this section to an applicant other than the existing licensee, the Commission may require the new licensee to provide reasonable compensation to the existing licensee in addition to the amount required to be paid pursuant to subsection (a)(1). All of such compensation may be in money or electric power, or both.*

*(2) In providing any compensation under this section, the Commission shall take each of the following into consideration:*

*(A) The fact that upon expiration of its license under this Part, the prior licensee has no cognizable legal right to compensation for the license.*

*(B) The extent to which the costs of the project have been amortized by the existing licensee.*

*(C) The costs to the new licensee of duplicating the hydroelectric facility which is the subject of the license (including all power facilities, dams, and appurtenant structures and equipment), taking into account the remaining useful life of the facility.*

*(3) The Commission shall promulgate regulations to implement this subsection. The regulations shall provide guidance for the Commission and applicants to follow in determining reasonable compensation in appropriate cases. Such regulations may provide for such compensation as the Commission finds to be appropriate toward the mitigation of any demonstrated economic loss to the customers of the existing licensee. The regulations shall not establish compensa-*

BEST COPY AVAILABLE

*tion which discourages competition for a project or provides a windfall or current ratepayers or to the existing or new licensee. The regulations shall be promulgated within 180 days after enactment of the Electric Consumers Protection Act of 1985.*

[(b)] *(f)* In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of the Act of August 15, 1953 (67 Stat. 587; 16 U.S.C. 828-828c), every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

* * * * * * *

SEC. 30. (a) Except as provided in subsection (b) or (c), the Commission may grant an exemption in whole or in part from the requirements of this part, including any license requirements contained in this part, to any facility (not including any dam or other impoundment) constructed, operated, or maintained for the generation of electric power which the Commission determines, by rules or order—

(1) is located on non-Federal lands, and

(2) utilizes for such generation only the hydroelectric potential of a manmade conduit, which is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.

(b) The Commission may not grant any exemption under subsection (a) to any facility the installed capacity of which exceeds 15 megawatts *(40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for water supply for municipal purposes).*

(c) In making the determination under subsection (a) the Commission shall consult with the United States Fish and Wildlife Service, *National Marine Fisheries Service* and the State agency exercising administration over the fish and wildlife resources of the

BEST COPY AVAILABLE

State in which the facility is or will be located, in the manner provided by the Fish and Wildlife Coordination Act (16 U.S.C. 661, et seq.), and shall include in any such exemption—

(1) such terms and conditions as the Fish and Wildlife Service, *National Marine Fisheries Service* and the State agency each determine are appropriate to prevent loss of, or damage to, such resources and to otherwise carry out the purposes of such Act, and

(2) such terms and conditions as the Commission deems appropriate to insure that such facility continues to comply with the provisions of this section and terms and conditions included in any such exemption.

(d) Any violation of a term or condition of any exemption granted under subsection (a) shall be treated as a violation of a rule or order of the Commission under this Act.

*(e) No small power production facility which requires the impoundment or diversion of the water of a natural watercourse by means of a new dam or diversion may be treated as a qualifying small power production facility unless each of the following requirements are met:*

*(1) At the time of issuance of the license or exemption for the facility, the Commission includes in such license or exemption terms and conditions in accordance with subsection (c) to protect, mitigate damages to, and enhance fish and wildlife, including related spawning grounds and habitat and finds that the facility, after taking into consideration such terms and conditions and compliance with other environmental requirements of law applicable to such facility and the effects of such facility alone and in combination with other facilities on the same watercourse, will not have substantial adverse effects on the environment, including recreation or water quality. The Commission shall publish the basis for such finding. Such terms and conditions shall be established and enforced in accordance with the same procedures as provided in subsections (c) and (d).*

*(2) The Commission determines, at the time of issuance of the license or exemption, that the facility is not located on any segment of a natural watercourse which is included (or is designated by law for potential inclusion) in a State or national wild and scenic river system or which the State has determined, in accordance with applicable State law and prior to issuance of the license or exemption, to possess unique natural, recreational, cultural, or scenic attributes.*

*This subsection shall not apply for purposes of section 210 of this Act (relating to interconnection authority).*

*(f) The Commission, in addition to the requirements of section 10(e), shall establish fees which shall be paid by an applicant for a license or exemption for a facility referred to in subsection (a) or (e) of this section. Such fees shall be adequate to reimburse the fish and wildlife agencies referred to in subsection (c) for any reasonable costs incurred in connection with any studies or other reviews carried out by such agencies for purposes of compliance with this section. The fees shall, subject to annual appropriations Acts, be transferred to such agencies by the Commission for use solely for purposes of carrying out such studies and remain available until expended.*

*(g) The Commission shall promulgate such rules as may be necessary to prohibit the commencement of any significant modification of any project licensed under, or exempted from, this Act unless such modification is in accordance with the terms and conditions of such license or exemption and the applicable requirements of this Part. As used in this subsection, the term "commencement" refers to the beginning of physical on-site activity other than surveys or testing.*

***SEC. 31. ENFORCEMENT.***

*(a) The Commission shall monitor and investigate compliance with each license and permit issued under this part and with each exemption granted from any requirement of this Part. The Commission shall conduct such investigations as may be necessary and proper in accordance with this Act. After notice and opportunity for hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses and permits issued under this Part and with the terms and conditions of exemptions granted from any requirement of this Part.*

*(b) After notice and opportunity for an evidentiary hearing, the Commission may also issue an order revoking any license or permit issued under this part or any exemption granted from any requirement of this Part where any licensee, permittee, or exemptee is found by the Commission:*

*(1) to have knowingly violated a final order issued under subsection (a) after completion of judicial review (or the opportunity for judicial review); and*

*(2) to have been given reasonable time to comply fully with such order prior to commencing any revocation proceeding.*

*In any such proceeding, the order issued under subsection (a) shall be subject to de novo review by the Commission. No order shall be issued under this subsection until after the Commission has taken into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation.*

*(c) Any licensee, permittee, or exemptee who violates or fails or refuses to comply with any requirement, rule, regulation, term, or condition referred to in subsection (a) or any order issued under subsection (a) shall be subject to a civil penalty in an amount not to exceed $10,000 for each day that such violation or failure or refusal continues. Such penalty shall be assessed by the Commission after notice and opportunity for public hearing. The Commission may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner. No civil penalty shall be assessed where revocation is ordered.*

* * * * * * *

BEST COPY AVAILABLE

## ADDITIONAL VIEWS ON H.R. 44—THE ELECTRIC CONSUMER PROTECTION ACT

The Electric Consumers Protection Act of 1985 reflects many months of hard work by a number of members of Congress to achieve consensus on legislation to reform the procedures regarding the relicensing of hydroelectric facilities. This legislation eliminates any possibility that public utilities will be afforded preference in relicensing of hydroelectric facilities.

It is unfortunate that this legislation has rekindled the emotional debate between public owned utilities and investor owned utilities on the issue of public preference. There are those within the public power sector who have expressed concern that H.R. 44, in reality, is the start of an all-out assault by the private utilities on public power. It is our understanding that the Committee did not intend this legislation to impact the public utilities' initial preference of hydroelectric facilities. Further, this legislation does not alter in any way the current federal policies under which public systems and rural cooperatives receive a preference for power marketed by the federal government.

It is worth noting that the hydroelectric relicensing issue is just one of a number of electricity issues that the Committee will be considering. It is our expectation that the Committee will identify, reform, and, if necessary, eliminate inefficient and unproductive regulation of electric utilities. The Committee will discuss a number of electricity issues during the remainder of this session and in future sessions. Among those issues to be discussed are transmission, generation, Federal power marketing administrations, and the federal-state relationship in the setting electricity rates.

In conclusion, we believe H.R. 44 to be consensus legislation which creates sound public policy. There are a number of electricity issues which still must be looked at carefully. It is our opinion that each issue must stand or fall of its own merits. We feel that any effort to link this legislation with other electricity issues would be inconsistent with both the purpose and the intent of this legislation.

BILL DANNEMEYER.
MICHAEL G. OXLEY.
RALPH M. HALL.
HOWARD C. NIELSON.